

July 12, 2005



**TRANSCRIPT**

**July 12, 2005**

**MONTGOMERY COUNTY COUNCIL**

**PRESENT**

Thomas Perez, President  
Phil Andrews  
Howard Denis  
Marilyn J. Praisner

George Leventhal, Vice President  
Michael Knapp  
Nancy Floreen  
Steven A. Silverman  
Michael Subin



July 12, 2005

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46

Council President PEREZ: Good morning. I think Reverend Andrews, we did not see Reverend Andrews -- oh, there you are. Good morning.

Council President PEREZ: Reverend Andrews. Oh, I apologize. I'm sorry, I was told that, I apologize. Well, let's begin. And thank you for your patience.

REVEREND ANDREWS: You're welcome.

Let us pray. God of daily delight, we thank you for the gift of this day and for the opportunity it brings each one of us to be partners with you in the ongoing work of creation. This day we ask your special blessing upon this deliberative body and upon the people of Montgomery County. As these Council members embrace their calling to guide and shape civic community we ask you to give them wisdom and courage. Whether the issue is budget priorities, or environmental concerns, or transportation controversies, we ask you to lift debate above the level of partisan politics so that it may indeed serve the common good. God give to these leaders your wisdom, fill their conversation with truth, open their minds to new perspectives, warm their hearts with compassion, and guide their decisions toward your vision of justice and freedom and abundance for all your children. We pray this in the name of your Universal Spirit, oh God, a Spirit that speaks through Moses and Buddha, and Krishna, and Jesus of Nazareth. Amen.

Council President PEREZ: Thank you. Thank you for your patience. You might want to take that prayer to Capitol Hill, too. Ms. Lauer, agenda and calendar changes?

County Clerk LAUER: The consent calendar has two additional items. V is introduction of a Resolution to Authorize Advance taking of the Montrose Road West project and just to note that a corrected version of that Resolution has been distributed to you this morning and we're adding Action of Confirmation of the County Executive appointments to the East County Citizens Advisory Board. Thank you.

Council President PEREZ: Okay. Thank you. Madam Clerk, approval of minutes.

Deputy Clerk PARADISE: We have the minutes of June 28th for approval today.

Council President PEREZ: Move it.

Second it.

Council President PEREZ: All those in favor? Unanimous among those present. No petitions. Let's move to consent calendar.

Councilmember FLOREEN: Moved.



July 12, 2005

1 Councilmember Silverman: Second.

2

3 Council President PEREZ: Moved and seconded. Mr. Silverman.

4

5 Councilmember SILVERMAN: Thank you, Mr. President. When we get back to the full  
6 Council, the recommendations of the Committee, which I guess we're not, is that right?  
7 I'm sorry, Item H. G and H. Fire. Sorry. It would be helpful if I said when we get this  
8 stuff back.

9

10 Councilmember PRAISNER: Pick an item, Steve.

11

12 Councilmember SILVERMAN:-- G and H. Is this going back to Committee or it's just  
13 going to full Council at this point because this is the Committee's recommendations.  
14 Okay. Then my question is, what I would like to ask, when we get it is whether any,  
15 what items, if any contained in the appropriations would be potentially subject to bond  
16 financing as opposed to what I gather the Committee has recommended, which is  
17 reserves, operating reserves.

18

19 Councilmember KNAPP: We had asked that but, I would be happy to have people  
20 continue to explore that.

21

22 Councilmember Silverman: Did they give you an answer?

23

24 Councilmember KNAPP: There really wasn't anything that was eligible because most of  
25 the apparatus you're trying to outfit is, useful life is roughly 10-12 years. But we should  
26 still ask the questions.

27

28 Councilmember SILVERMAN: No, I mean if they have anything I just want to  
29 understand what our fiscal options may be. I'm very supportive of the direction the  
30 Committee's going I just wanted to find out if there was anything since it's a fairly big  
31 ticket item. Okay. Thanks.

32

33 Council President PEREZ: Mr. Denis.

34

35 Councilmember DENIS: Thank you, Mr. President. As lead member for personnel I'd  
36 like to elaborate on Item 2M. These are the last the two appointments to the Board of  
37 Investment Trustees, which oversees the investment of more than \$2 billion in County  
38 retirement funds. Last December as the Council may recall, we increased the board  
39 size from 9 to 13 trustees. The categories of trustees are spelled out on Circle 3 of the  
40 packet. Of the four additional trustees, two are expert representatives of the public in  
41 addition to the two already on the board for a total of four in this category. The other  
42 two additional trustees, those whose appointments are to be confirmed today, Walt  
43 Bader, of the Fraternal Order of Police, and Jeffrey Buddle of the Career Firefighters are  
44 representatives of County bargaining units in addition to the one position that was  
45 already on the board which is now held by Gino Renne of MCGEO. Now, all three  
46 County bargaining units have representatives on the board. On the Board of



July 12, 2005

1 Investment Trustees are fiduciaries of the County's retirement funds and they have a  
2 very important mission. The board's Chair for the past four years has been our excellent  
3 Council Staff Director, Steve Farber. By our action today, we are rounding out the  
4 board's expanded membership so that it can do the most effective possible job for our  
5 employees, retirees and taxpayers. Thank you.

6  
7 Council President PEREZ: Thank you. Ms. Praisner.

8  
9 Councilmember PRAISNER: Yeah, on Items E and F, the supplemental appropriations  
10 on the homeland security money, I'd just like to have, before we act on those, the status  
11 on our priority list of how we're spending the money falls within our list of priorities for  
12 homeland security. I thought we had requested that that information come with each  
13 request and, we, I don't see it. So, where is the priority list? Secondly, on the special  
14 appropriations on fire and rescue, one of the sources is the consolidated fire tax district  
15 fund reserves. I'd like to know the status of those reserves before we indicate a source  
16 of funding and, my reflection or recollection from conversations with folks about that  
17 issue, is I'm not sure how much money is there for this kind of source of funding.

18  
19 Council President PEREZ: Mr. Leventhal.

20  
21 Councilmember LEVENTHAL: I wanted to thank the, this is regarding Item I. I wanted  
22 to thank the Executive Branch and also the Council Staff, particularly Essie McGuire for  
23 correcting an unfortunate oversight and making sure that the Jewish Foundation for  
24 Group Homes is able to purchase the vans that it was the Council's intent that they be  
25 able to purchase. There are a lot of moving parts in the grants process as we all know  
26 and sometimes things get missed and this was one where we made a mistake but now  
27 we fixed it and I'm glad that the Jewish Foundation for Group Homes will be able to  
28 pursue its very important work. Also, there are a lot of outstanding county citizens  
29 appointed to boards and commissions. Today I just wanted to thank Patty Vitale-Rapp  
30 of my Staff for taking over the Council representative position on the local management  
31 board for Children Youth and Families that was previously held by Valerie Ervin.

32  
33 Council President PEREZ: Okay. All those in favor of the consent calendar, unanimous  
34 among those present. Legislative Session, Item 3, or actually beforehand, approval of  
35 the legislative journal.

36  
37 Deputy Clerk PARADISE: The journal of May 26th and June 28th for approval.

38  
39 Council President PEREZ: Moved and seconded. Okay. All those in favor, unanimous  
40 among those present. Introduction of Bills. Expedited Bill 19-05, Bond Authorization  
41 sponsored by the Council President at the request of the County Executive. Public  
42 Hearing and Action scheduled for July 26th at 1:30 p.m. Pretty straight forward. Bill 20-  
43 05, Transmission Facility Coordination Amendments sponsored by Councilmember  
44 Praisner. A Public Hearing on the 20th of September at 1:30. Ms. Praisner.



July 12, 2005

1 Councilmember PRAISNER: I want to thank folks for the work on this, including Sonya  
2 and Ralph Wilson, and just make some comments. And as we were reviewing our  
3 telecommunications legislation in order to deal with the ZTA, which will be introduced  
4 today as well, it came to our attention that there are ambiguities in the legislation and  
5 places where the phrasing was not the same in dealing with similar structures and  
6 facilities. So we were trying to clarify those issues, and that's what this legislation is  
7 intended to do.

8  
9 Council President PEREZ: Okay. Thank you. Let me, well why don't we, as long as  
10 you're on that, Ms. Praisner, let's go briefly to Item 6 which is only Text Amendment 05-  
11 10, Telecommunication Facility Amendment sponsored by Councilmembers Praisner  
12 and Knapp. Resolution for Public Hearing on September 20th at 1:30.

13  
14 Yes please.

15  
16 Councilmember PRAISNER: So moved.

17  
18 Councilmember KNAPP: Second it.

19  
20 Council President PEREZ: Moved and seconded. All those in favor, unanimous among  
21 those present.

22  
23 Did you have anything that you want to add on this?

24  
25 Councilmember PRAISNER: I want to thank Mr. Knapp for co-sponsoring this. Again, it  
26 is trying to review comprehensively telecommunications facilities and clarify the  
27 language that's included to make sure we're dealing with appropriate terms. I also want  
28 to make certain that we wanted to introduce this in order to provide opportunity for folks  
29 to comment before we get to the, through the summer and to have the Public Hearing  
30 as it is scheduled in September. There may be additional modifications to the language  
31 as we work through this and I want to make clear that at least this sponsor and I believe  
32 Mr. Knapp as well are not wedded to the specific content of the zoning text amendment.  
33 It's an effort to try to move this along and we'll certainly be open to modifications.

34  
35 Council President PEREZ: Mr. Knapp.

36  
37 Councilmember KNAPP: Thank you, Mr. President. I want to thank Ms. Praisner for her  
38 efforts on this. I know this has been a long standing issue that she has been bird  
39 dogging for the Council and I would concur with her statements in that, this is something  
40 that, I don't necessarily believe that we have all the right language in necessarily, but  
41 look to work with the community and other organizations to make sure we've got all of  
42 the right pieces. It cuts across, as I understand it, local, federal, and some state  
43 requirements as well as just the continuing movement of technology to make sure we  
44 define things the right way. One question I would have for Staff is, with the introduction  
45 of this ZTA, does it have any impact on any pending applications or applications that



July 12, 2005

1 people may want to submit while we kind of go through and look at all the pieces  
2 associated with this legislation?

3  
4 Sonya HEALY: We'll have to check and see which ones are pending.

5  
6 Council President PEREZ: Okay. Great. Thanks.

7 Okay. Great. Thank you. Let's move back, then. We were Legislative Session Agenda  
8 Item 07-05 is the Cable Communications Cable Compliance Commission Amendments.  
9 Let me turn to Ms. Praisner.

10  
11 Councilmember PRAISNER: Yes. The Management and Fiscal Policy Committee  
12 reviewed this legislation and recommends approval as amended. The legislation, as  
13 you know, extends the sunset date for the Cable Compliance Commission until  
14 December 31, 2008, and eliminates the requirement that prospective members file a  
15 limited public financial disclosure statement. In other words, folks who are selected to  
16 serve on the Commission would still be required but not those who are prospective  
17 candidates. And in essence, the Cable Compliance Commission was created in order  
18 to create an independent panel to review and decide consumer complaints about cable  
19 services, if the Office of Cable and Communication Service, namely the Cable Office,  
20 cannot resolve the complaint with the cable company in 30 days.

21  
22 The Cable Office of course, is looking at this issue on a quarterly basis as provided in  
23 the franchise agreements. What this does is allow an individual consumer to raise the  
24 complaint or issue and gives the Commission the ability to provide a remedy for those  
25 complaints if they haven't been resolved in a timely manner. The panel may award a  
26 consumer up to \$1,000 for damages resulting from violations of the cable law or the  
27 franchise agreement. As you know, the Commission was organized in May 2003 and  
28 the Department of Technology Services, Denis Rooney is here, is responsible for  
29 supporting the Commission. At the Committee work session, the department indicated  
30 their support for the legislation and for the amendment that was proposed. As you  
31 know, in the packet, and as the Committee commented, we do not measure the  
32 success of the hearings necessarily by the settlements or actions, but just by the  
33 presence of the Commission, we believe that that has a capacity to bring folks to the  
34 table and to try to bring resolution on issues that may be of concern to an individual  
35 complainant. The packet also makes reference to the significant number of complaints  
36 in the Cable Office at this point, and I think individual Councilmember offices may have  
37 received in recent months or weeks, a quantity of complaints. Without making  
38 judgments as to the rationale for why those complaints, I think the mere presence of  
39 those complaints indicates that we have issues within this County relative to the  
40 consumers views about the level of service they are receiving.

41  
42 Many of the complaints within the Cable Office at this point are more than 30 days old,  
43 and as the packet indicates, there are a total of over 266 open complaints on average.  
44 They were filed more than 30 days ago. Almost two months ago.



July 12, 2005

1 The Cable Communications Advisory Committee supports the legislation. The Bethesda  
2 Chamber of Commerce provided a letter that took no position on the original Bill but had  
3 concerns about the amendment that would allow prospective subscribers to file  
4 complaints with the Commission. The Committee considered the complaints, or  
5 questions, raised by the Bethesda Chamber, but nevertheless believes that from a  
6 standpoint of individuals who should be expected to or have the logic of a belief that  
7 they are entitled to service, that they would have the right to raise that complaint to a  
8 level of having the Commission consider that issue.

9  
10 This does not automatically side one way or the other. And in fact when you look at the  
11 Commission's conclusions, most of those have been in favor of the provider.

12  
13 So the Committee recommendations are before the Council, and I'd be happy to answer  
14 any questions that there may be.

15  
16 Council President PEREZ: Did we invite Jane Lawton up?

17  
18 Councilmember PRAISNER: Sure, but it's not, Jane is the Cable Office but Dennis  
19 Rooney is, Janice and Jane could both respond.

20  
21 Council President PEREZ: Sorry, the relevant County officials.

22  
23 Councilmember PRAISNER: Well, Jane Lawton is the first entry of response for  
24 complaints, Dennis supports the Commission. The view was that there should be  
25 separate individuals, obviously, within the department. Not necessarily the Cable  
26 Office, which is the first office managing the complaints to be the manager of the, and  
27 support of the Commission, which is. I think, the role Mr. Rooney plays.

28  
29 Council President PEREZ: Ms. Praisner, I don't know if this is a question for you or for  
30 them but if the Bill is passed, whose office will then be the repository of the complaints?

31  
32 Councilmember PRAISNER: Well, the complaints have to go first to the Cable Office.  
33 They have to be more than 30 days old. And then an individual does, it doesn't  
34 automatically go to be filed to the Commission, it is an individual who has to exercise  
35 that opportunity. And Dennis.

36  
37 Dennis Rooney: We actually have a form that the individual fills out and then sends to  
38 the Commission requesting a hearing. And then we inform the, we give that request to  
39 the Commissioners, they then look at it and see whether in fact it meets the criteria  
40 before hearing for the Commission and then if that's the case a hearing is set up and  
41 scheduled, and if as in many cases a negotiation takes place and there's a settlement  
42 then the Commission will cancel the hearing.

43  
44 Council President PEREZ: Okay.



July 12, 2005

1 I'm just looking at Page 2, which noted that the total number of complaints to the Cable  
2 Office as of June 2005 was 789? And then 266 were received in the month of June?  
3 What happened in the month of June?  
4

5 Jane Lawton I don't know. I think the cable company should have to answer that. One  
6 thing that we're having this month.  
7

8 Council President PEREZ: Let me back up. What are, is there a pattern to the  
9 complaints that you're receiving? Is it a similar set of allegations? That number sort of  
10 jumped off the page at me.  
11

12 Jane Lawton: Well right now we're getting a lot of complaints about no service and  
13 about the length of time it takes to get out to repair it. That's the, I mean, yesterday we  
14 arrived there were 17 voice mails and 25 came in within the first two hours. So we're  
15 having, and I think the most recent ones, many of them are the product of the storms  
16 that we've recently had. So I think, this time of year often has a bit of an increase, but  
17 these are, last month was higher than it has ever been including the time of  
18 construction. And, you know, I can't, we can give you those numbers so that you can  
19 see exactly what it is. It's service, it's billing, but, and it's cable modem. The two  
20 highest last month I believe were cable modem and service.  
21

22 Councilmember PRAISNER: Tom, we have the quarterly customer service discussions  
23 and in the MFP Committee. The next one is scheduled for July 25th, when we will  
24 discuss customer service issues for Comcast, Starpower and also, we have expanded  
25 that discussion to include Verizon and we will have a conversation with Verizon as well.  
26 Last time we had a discussion with the Public Service Commission present as well  
27 because of complaints which Comcast has lodged at the Public Service Commission  
28 about Verizon installers causing problems.  
29

30 Jane Lawton: I think that bears noting, also. Comcast says that Verizon has cut many  
31 of their lines. And so that could in fact be part of the complaints about lines going  
32 across their lawn above ground, not buried and stuff like that, could be repairs from  
33 Verizon cuts some of them.  
34

35 Council President PEREZ: Are any of these complaints, the 266, were any of them from  
36 prospective customers?  
37

38 Jane Lawton: I can't say off the top of my head. I don't know.  
39

40 Council President PEREZ: Do you have a sense of how many, say, I don't know, the  
41 last year? How many complaints ballpark you've received from prospective customers?  
42

43 Jane Lawton: Probably less than five. We don't get too many. People who aren't being  
44 served because they, well, we may have more than that. It's the new areas where  
45 they're maybe not as dense of housing, they often are on the edge of whether or not



July 12, 2005

1 they should be being served and sometimes we even send our own inspectors out to  
2 measure it off because there's a specific requirement.

3  
4 Council President PEREZ: I had a constituent in Takoma Park who was trying to get  
5 service and it proved very elusive. And he had many calls and with Comcast, and  
6 ultimately got service. But I'm curious, can somebody, under current law does that  
7 person, would you adjudicate a complaint?

8  
9 Jane Lawton Oh, absolutely. Absolutely, yes.

10  
11 Council President PEREZ: To somebody like that?  
12 He's a prospective customer, though. Who's saying that?

13  
14 Jane Lawton: We would. We would. The Commission at the present time would not but  
15 we would.

16  
17 Dennis Rooney The Commission actually has had two cases that came to us requesting  
18 assistance for people who were not customers and we were forced to turn them away  
19 because we did not have the legislative authority to deal with it. So there have been.

20  
21 Council President PEREZ: Two cases.

22  
23 Dennis Rooney: Two cases that got to us and we turned them back.

24  
25 Council President PEREZ: I got an e-mail yesterday, I think it was from a couple of  
26 Chambers of Commerce expressing concern that if you were to adopt this amendment it  
27 would open up the floodgates to a lot of complaints. Do you have an opinion on  
28 whether you think if prospective customers as opposed to customers who already are  
29 under contract with Starpower or Comcast have authority to file complaints? Are you  
30 concerned about a floodgates problem?

31  
32 Dennis Rooney: From our perspective, I don't think feel we'll have that much of a  
33 problem. I think there are issues that I think, the Commission, when we get our first  
34 case to officially look at, we'll have to decide, you know, the Commission will have to  
35 decide how it wants to approach it and what solution can be evolved at to get customer  
36 service that the Commission feels should get service. Obviously, the carrier has  
37 limitations that they've published, but in some cases that may be ambiguous and we'll  
38 have to work with that, as it comes up. So far, I think that the Commission has been  
39 extremely fair with regard to the hearings that they've actually held. And think there has  
40 been a good deal of effort to resolve issues that are resolvable prior to actually having a  
41 hearing and I think the numbers kind of indicate that. From our perspective we think  
42 that's been a positive thing.

43  
44 Jane Lawton: I think it's important to note, it's not easy to take a case to the  
45 Commission. Many people choose not to because it is a quasi-judicial body and they  
46 require it to be done in a certain way and many people don't want to go to that trouble.



July 12, 2005

1 So, those, we continue to help the way we can. But, I think this offers an individual very  
2 valuable relief that is not in our legislation otherwise.

3  
4 Council President PEREZ: A number of lights. I think Mr. Knapp, Mr. Leventhal, Mr.  
5 Silverman, Mr. Subin.

6  
7 Councilmember KNAPP: Thank you, Mr. President. Reading the packet last night, and  
8 when Ms. Praisner introduced this, I'm very supportive of the Bill as introduced to  
9 extend the sunset for the CCC, but I was struck by the third paragraph and I just wanted  
10 to, somebody could explain how it works to allow prospective subscribers to file  
11 complaints? What types of complaints would they file? How would they approach it?  
12 I've got to admit, as I looked at this last night, I was trying to think of any other market I  
13 could think of where somebody who thought they wanted to purchase a product could  
14 file a complaint before they'd actually purchased the product. And so I just wanted to  
15 ask that as a question as to kind of how that works and how that, how do we get down  
16 this road?

17  
18 Councilmember PRAISNER: Our consumer protection law at this point in the County,  
19 already provides for prospective purchaser. A consumer in the definitions of our current  
20 consumer protection law is a purchaser, a lessee, a recipient or a prospective  
21 purchaser, lessee, or recipient of real estate, consumer goods or services, or consumer  
22 credit including a co-obligor surety. So, the law right now under consumer deals with  
23 prospective purchasers.

24  
25 Jane Lawton: And our franchise has requirements about service that you're supposed to  
26 be served if you fit, you know, your house is supposed to be served if you fit certain  
27 requirements. So, I mean, the franchise addresses it.

28  
29 Councilmember KNAPP: But explain that further. I'm still struggling. So what would a  
30 prospective customer come forward with as a complaint?

31  
32 Dennis Rooney: Well, to some extent I'm speculating, but based upon some of the  
33 things I've seen, let me give you a couple of potential examples. In some cases you  
34 have people that are renting space from someone else or who are living in a facility or a  
35 building that someone else is paying the utilities and/or the services for. And the person  
36 who owns the facility may not be paying the facility bills therefore creating an issue with  
37 a carrier or a utility where they will not provide any additional receives to someone  
38 who's living there because the actual responsible person is not financially taking care of  
39 their issues. Okay? And that's one potential.

40  
41 Another one is where you have someone who is legitimately renting a space in a facility  
42 where another person already has a connection and they would like to have a separate  
43 connection and perhaps the carrier franchise has a reason why they, for some reason,  
44 don't want to provide a second billable facility at that location. And I think that's the kind  
45 of thing that needs to be adjudicated to what's reasonable and fair. And where should



July 12, 2005

1 we go with that? I think that's the kind of thing that you get into with someone who  
2 wants service.

3  
4 Okay?

5  
6 Jane Lawton: Or people in the Up County where it's less dense and there's supposed  
7 to be certain number of homes per mile, then they're supposed to provide service. And  
8 I think that was one where the person believed that he was within that distance of his  
9 neighbors, et cetera, and the company originally thought he was and then decided that  
10 they didn't think he was. So that's one that could be adjudicated.

11  
12 Councilmember KNAPP: I appreciate Ms. Praisner's reading of the consumer  
13 protection. I was just curious. What other things does that, I mean, did the Committee  
14 look at what other things that that applies to? Because I was just--

15  
16 Councilmember PRAISNER: No. That's the law as it exists now. We didn't look at the  
17 existing law. We were just dealing with the issues as brought to us by Cable Office and  
18 others who said that they would like the opportunity to at least be heard when you're  
19 deploying service. The franchise is built on an assumption of level of service, as Jane  
20 said, based on nodes and distance. If someone believes they do have that many  
21 people living in an area and they're eligible for service particularly an Up County issue I  
22 believe then and they can't be heard because the Cable Commission believes that they  
23 can only deal with someone who has service at that point, there isn't that opportunity to  
24 even discuss or consider if there's a difference of opinion as to the level of people who  
25 live there and therefore should have service.

26  
27 Councilmember KNAPP: And right now, if there was a question, it would come to your  
28 office, Jane?

29  
30 JANE LAWTON: Yes. I mean we would do everything we could to bring pressure on the  
31 company to change their mind.

32  
33 Councilmember KNAPP: And what would that, I mean, you said you've had what, five  
34 cases or five examples?

35  
36 JANE LAWTON: I'm just saying, I would, I don't estimate that we get a huge number of  
37 these cases in a year. People have better things to do than complain unless they really  
38 want service and believe that they have are due it. So, I really don't know off the top of  
39 my head, but we get some.

40  
41 Councilmember KNAPP: Do you know how many of those got resolved? Of those that  
42 you got, that you received? How did you, how did they get taken care of?

43  
44 JANE LAWTON: I can't tell you off the top of my head.

45



July 12, 2005

1 I mean we do, go out, we have inspectors and we send them out and they sometimes  
2 measure it and get to the company. I think, you know, we resolve some of them, yeah.

3  
4 SONYA HEALY: But Councilmember Knapp I think it's important to point out that the  
5 Cable Officer is looking at quarterly compliance based on quarterly customer service  
6 numbers, whereas the CCC would be able to provide a remedy for an individual  
7 consumer.

8  
9 Councilmember KNAPP: You know, and I appreciate that. I was just trying to get a  
10 sense of was there something that was left unresolved from the Office that would then  
11 need to have been escalated to the CCC for adjudication or resolution. I may come  
12 back. Whoever's next.

13  
14 Council President PEREZ: You were next.

15  
16 No.

17  
18 Councilmember PRAISNER: I wanted to just comment as the Chair. No.

19  
20 Councilmember LEVENTHAL: Okay. I'd like to understand who in Montgomery County  
21 is eligible for cable TV and who is not?

22  
23 JANE LAWTON: Everybody in Montgomery County is eligible, is supposed to be getting  
24 the same services except for those who are in, there are just a few areas where they're  
25 not built dense enough. I can't pull it right off the top of my head, it's a certain number  
26 of homes per mile. And there are very few that are not that dense but there are a few  
27 particularly in the Up County. But that is the other thing. Everyone is supposed to be  
28 eligible for the same services and, you know, no red lining, no cherry picking. All of the  
29 same services are supposed to be available at the same cost across the County.

30  
31 Councilmember LEVENTHAL: Under the franchise agreement with Comcast.

32  
33 JANE LAWTON: Right. Well with all of our—

34  
35 Councilmember PRAISNER: Well, no, Starpower's franchise agreement does not  
36 extend for [overlapping speakers] the area of the franchise that's right.

37  
38 Starpower does not extend into the Up County. It's a limited area franchise,  
39 Starpower's is.

40  
41 Councilmember LEVENTHAL: Okay. So there's a definition in the franchise agreement  
42 having to do with how many homes per square mile.

43  
44 JANE LAWTON: Right.

45



July 12, 2005

1 Councilmember LEVENTHAL: And so it is possible that there would be some individuals  
2 who might believe they're entitled to cable TV and they might use this new language to  
3 complain.

4  
5 JANE LAWTON: Well they would complain.

6  
7 Councilmember LEVENTHAL: If this new language were enacted they might go to the  
8 CCC.

9  
10 JANE LAWTON: Right. To appeal their.

11  
12 They'd have to come to us, have 30 days –

13  
14 Councilmember LEVENTHAL: And the CCC would rule either they are or they aren't  
15 entitled.

16  
17 JANE LAWTON: They just look at it for its merit.

18  
19 And they've been very good at looking at the franchise. Does it comply with the  
20 franchise or does it not. And I think they've been very, very judicious and fair.

21  
22 Councilmember LEVENTHAL: Okay. Is Comcast here? I'd like to, I'd appreciate the  
23 Council President's questions and I had the same questions. I'd like to understand the  
24 basis for this concern over frivolous complaints. Can I get Comcast to address that?  
25 Are they here?

26  
27 SONYA HEALY: She was here a few moments ago.

28  
29 Councilmember LEVENTHAL: Let me just say, you know, I came here trying hard to, I  
30 came here this morning expecting that our biggest debate would be on building height.  
31 And, you know, I'm trying to get my mind around that. I frankly had not paid much  
32 attention. My understanding was that this was, you know, kind of a technical Bill that  
33 extended the sunset date on a Commission that we all like, and now I learned, shortly  
34 after getting ready to leave the house this morning that there was a big vote coming up  
35 on this question as to whether to allow prospective subscribers to have standing to file a  
36 complaint. And I'm listening to this and I'm not sure I see, it sounds, it doesn't seem  
37 very big. I'm not getting it. I'm inclined to allow prospective subscribers to have this  
38 standing but someone's got to explain to me why we should not since I haven't heard it  
39 yet. If Comcast isn't here they're not going to have a prayer of getting my vote.

40  
41 Councilmember PRAISNER: It's not over 35 feet, George.

42  
43 Councilmember LEVENTHAL: Come on now. Don't confuse me. I'm working so hard to  
44 understand this.

45



July 12, 2005

1 Councilmember PRAISNER: I'm sorry. Not having received any phone calls this  
2 morning, I'm not sure the magnitude of the big vote on this issue.

3  
4 Councilmember LEVENTHAL: Well someone has to make an argument for why this is a  
5 bad idea because I sure haven't heard it this morning. It sounds okay to me. Anybody  
6 want to make that case?

7  
8 Council President PEREZ: Well I mean --

9  
10 We're getting there.

11  
12 Councilmember LEVENTHAL: Okay.

13  
14 Council President PEREZ: Mr. Silverman then Mr. Subin.

15  
16 Councilmember SILVERMAN: Thank you. I had a couple of questions directed at the  
17 Executive Branch. The first one is, what is the current authority of the Commission with  
18 regard to non-monetary remedies?

19  
20 DENNIS ROONEY There is no authority for non-monetary remedies.

21  
22 Councilmember SILVERMAN: So the person who files a complaint with the Office of  
23 Cable Compliance, is that the name of the office?

24  
25 JANE LAWTON: No.

26  
27 Councilmember SILVERMAN: Whatever it is.

28  
29 Your office.

30  
31 JANE LAWTON: Services.

32  
33 Councilmember SILVERMAN: Jane's shop. Okay. So, somebody files a complaint  
34 saying they don't get service, they're not, you know, Comcast said you're outside the  
35 envelope or Starpower, for that matter, you're outside the envelope of the franchise.  
36 And so they file a complaint with your office. And, I'll get to what happens in your office  
37 in a second. But assuming that it isn't corrected under this amendment, they would then  
38 go file their complaint with the Commission? And, the Commission's authority is limited  
39 to \$1,000 in damages.

40  
41 Councilmember PRAISNER: Each violation.

42  
43 DENNIS ROONEY: It could be \$1,000 for either damages or punitive.

44  
45 Councilmember SILVERMAN: Or what.

46



July 12, 2005

1 DENNIS ROONEY: Or punitive.

2

3 Councilmember SILVERMAN: For punitive.

4

5 DENNIS ROONEY: Yes.

6

7 In other words, it could be a direct cost --

8

9 Councilmember SILVERMAN: Well here's what I'm trying--

10

11 I'm giving you the hypothetical that I couldn't get service because I live in Poolesville.  
12 And so what's the remedy that I'm going to get from the Commission?

13

14 JANE LAWTON I wouldn't have thought that the Commission was limited to monetary. I  
15 mean that's an interesting --

16

17 Councilmember SILVERMAN: Well, that is the law. So, what is the remedy?

18

19 DENNIS ROONEY: I don't know at this point. I think it's something we're going to have  
20 to try to evolve.

21

22 Councilmember SILVERMAN: No, this is a very straight forward question. I file a  
23 complaint. We have an amendment in front of us that is asking us to extend to  
24 prospective subscribers the ability to go to the Commission. I want to understand what  
25 it is, I'll ask the Committee Chair. What is the authority of the Commission? What's the  
26 remedy? Comcast comes in and says we don't think that we have to provide this.

27

28 DENNIS ROONEY: The remedy would be that if the Commission felt that the individual  
29 was not being properly served, and that it had cost the individual either business or  
30 some sort of inconvenience they could in fact apply \$1,000 fine.

31

32 Councilmember SILVERMAN: Right.

33

34 SONYA HEALY: Councilmember Silverman, first of all, under the existing law you have  
35 three remedies. You have refund, mediation, or an order for damages up to \$1,000 for  
36 each violation. So they could order a mediation agreement saying --

37

38 Councilmember SILVERMAN: It could order what? A mediation means nothing.

39

40 SONYA HEALY: Well, they could sit down and have a mediation with the company to  
41 try and get service.

42

43 Councilmember SILVERMAN: So the company says we still don't think we're supposed  
44 to provide service to you because you're outside the envelope, and so then the remedy  
45 is \$1,000. So they can't actually, the Commission can't actually order the provider to  
46 provide service to the individual's house.



July 12, 2005

1  
2 SONYA HEALY No. They would just listen to the case on the merits and decide whether  
3 it met the criteria or not.

4  
5 JANE LAWTON: But we can. [overlapping speakers]

6  
7 Councilmember SILVERMAN: So then let's go back to the cable.

8  
9 JANE LAWTON: They can say that they could make a decision that they thought they  
10 deserved it and that would give us the authority to go back.

11  
12 Councilmember SILVERMAN: My understanding, Jane is under the franchise  
13 agreement, that you have the authority to assess liquidated damages. You could  
14 revoke the nuclear option of revoking the franchise, or you can require them to pay  
15 damages or you could require them to provide service. Okay. So, I go back to I believe  
16 I'm entitled to service. Comcast or Starpower says it's outside the envelope, I file a  
17 complaint with you. Why does this case ever get to the Commission? Since I assume  
18 Joe Smith.

19  
20 JANE LAWTON If we agree with the cable company and say no. That would be one  
21 way it might get there.

22  
23 Councilmember SILVERMAN: No, I know that.

24  
25 JANE LAWTON: Displeased with us if the company continues to say no and we say  
26 they should be served and yet they don't get served then they could go there.

27  
28 Councilmember SILVERMAN: They could go to the Commission which has no authority  
29 to require them to provide the service. They have no authority under current law to  
30 provide the service, you do. So why would we be sending prospective subscribers to a  
31 Commission that can't give them a remedy? That's your office. Your office should be  
32 the office that is saying to Comcast or Starpower, you want us to start some fining  
33 mechanisms or other regulatory mechanisms because we think you're required. The  
34 other thing is, how does Joe Homeowner, who is prospectively a subscriber going to be  
35 able to bring a case to the Commission without in effect, you guys making the case for  
36 him or her?

37  
38 JANE LAWTON: No, it has to come through our office for 30 days.

39  
40 Councilmember SILVERMAN: I don't mean the 30 day provision.

41  
42 JANE LAWTON: They make it the same way they make them now by looking at the  
43 franchise and saying I believe that I fit. I mean that's what they do now because the  
44 Commission is very specific about looking at the requirements of the franchise. So the  
45 customer has to do that.



July 12, 2005

1 Councilmember SILVERMAN: Have you had cases where people have said that  
2 Comcast or Starpower is not providing service and I think I'm entitled to it?

3  
4 JANE LAWTON Yes.

5  
6 Councilmember SILVERMAN: And what has been the outcome of those? How many  
7 cases?

8  
9 JANE LAWTON: Sometimes they get service because we think they do and we  
10 pressure the company and sometimes they don't. Either way.

11  
12 Councilmember SILVERMAN: If they don't?

13 JANE LAWTON: [Inaudible] the company and they still don't get service. But usually if  
14 we pressure the company they get it. Although it's a one of those gray areas just like all  
15 of the other.

16  
17 Councilmember SILVERMAN: Well, why do you think that the, well, let me just ask this,  
18 what is the position of the County Executive on this amendment?

19  
20 DENNIS ROONEY: The County Executive supports this amendment.

21  
22 Councilmember SILVERMAN: Okay. What is the, is the County Executive essentially  
23 saying that he doesn't want your office to proceed with the remedies available under the  
24 franchise agreement?

25  
26 JANE LAWTON No I don't think so.

27  
28 DENNIS ROONEY: I don't believe

29  
30 Councilmember SILVERMAN: And wants to ship it off to the Commission.

31  
32 DENNIS ROONEY: I think what we have is an additional capability at a less than  
33 nuclear capability, if you will, to provide a quasi-judicial ruling at a lower level to be able  
34 to resolve an issue that has been festering on both sides of the fence for some time.

35  
36 Councilmember SILVERMAN: But Dennis, there's no remedy. It's a \$1,000 remedy.

37  
38 DENNIS ROONEY: It's a \$1,000 remedy but it's being effective.

39  
40 Councilmember SILVERMAN: What does it cost the cable company to bring, to run  
41 lines out, you know, if they believe that my house is outside the envelope because  
42 there's already actually a remedy in the franchise agreement which is you can get  
43 service, you just have to, it's a cost sharing arraignment. So it costs Joe Smith  
44 thousands of dollars to run lines outside the franchise envelope. So, do we assume it  
45 also costs Comcast or Starpower a significant amount of money to run lines outside  
46 their franchise agreement?



July 12, 2005

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46

JANE LAWTON: Depends on how far it is.

Councilmember SILVERMAN: More than \$1,000?

DENNIS ROONEY: It could be.

Councilmember SILVERMAN: I mean you're setting, what I'm really troubled by is the fact that if there's going to be enforcement of the non-subscriber aspect it should be in your lap because you actually can do something about it. Talk about a false remedy, sending it off to the Commission, if I was Comcast or Starpower I'd say fine, let them take it to the Commission. What are they going to do, issue a fine, I'll pay the \$1,000.

Councilmember PRAISNER: But obviously Comcast by virtue of phone calls that have been made is very upset about this issue.

Councilmember SILVERMAN: I don't know. Did they call you, Ms. Praisner?

Councilmember PRAISNER: No, but obviously from the comments we've heard somebody is upset.

Councilmember SILVERMAN: Well, you know, I think, I really resent the accusation, Ms. Praisner. You proposed an amendment that I don't happen to agree with because it doesn't provide a remedy. The remedy is right there with the Executive Branch. So we don't need to get into discussions about phone calls being made.

Councilmember PRAISNER: Well, as I said, I didn't receive any phone calls which obviously has already been alluded to this morning, Mr. Silverman. I didn't make that reference. All I'm saying, and somebody is upset about this. The Executive is not. If it really is a paper tiger that is meaningless then it should be meaningless to other individuals or potentially as meaningless to other individuals as well. That was my only comment. I'm not suggesting or ascribing anything to your questions. I'm just saying, Mr. Leventhal made reference to a flurry of phone calls. That's all.

Councilmember LEVENTHAL: Could I just clarify that? I mean look, I've received, the Council President mentioned a couple of Chambers of Commerce, one of them is referenced in the packet. I haven't been targeted with a flurry of phone calls, in fact what I said was, I really hadn't paid much attention to this at all. And then it was brought to my attention this morning as something that I would have to really think about. I don't mean to imply that it's a huge controversy.

Councilmember PRAISNER: Let's pull all back.

Councilmember SILVERMAN: Okay. I'll just close by saying the problem that I have with this is I think it's not a remedy. The remedy is with the office that is charged with enforcing the franchise agreement. and if that office is basically not doing its job by



July 12, 2005

1 enforcing the franchise agreement because subscribers, in other words, you should be  
2 making the decision, Jane, because guess what, how is a lay person supposed to go to  
3 a lay panel and say they're in or out the site of the service area without your office  
4 having already made that determination? And to suggest that somebody that, well, you  
5 know we made a decision about this and in our opinion, the opinion of the people who  
6 are responsible for enforcing the franchise agreement, that, you know, you don't get  
7 covered, to then ship them off to a Commission which can award a \$1,000 fine provides  
8 them, A, no remedy and B, they're ill prepared to present the case unless they want to  
9 go spend whatever time is necessary to reach a conclusion that you all didn't reach. I  
10 thought that's what you guys do every day is enforce the franchise agreement. I'm not  
11 saying you're not doing it. I'm saying, what I'm hearing you say is that this provides  
12 another remedy for somebody, but I'm presuming that you will have made a decision  
13 about whether a prospective person is in or out.

14  
15 JANE LAWTON We will. And the deal, I think the only thing this offers a person is an  
16 appeal. It offers them the ability to appeal. So right now, people who are subscribers  
17 can appeal what's happened or not happened within 30 days. And it could be that's one  
18 of the reasons why I'm not the person staffing this Committee. It could be, they may  
19 have problems with what we've done and they may want to appeal that to them. To the  
20 he point And so the point is, that this gives the individual the same appeal that a  
21 subscriber has, a perspective one.

22  
23 Councilmember SILVERMAN: Except that, you know, the most that they have for a  
24 remedy is \$1,000 monetary remedy. The Commission doesn't have the ability to order  
25 them to provide service, which you do. And if you haven't reached the conclusion that  
26 they're required to provide service, then I don't know how the Commission is going to sit  
27 there and make a decision that, you know, Comcast or Starpower you know, violated  
28 this person's right to get service within the service area. That's my only point.

29  
30 Councilmember PRAISNER: Steve, the only point I would make is that, while I think the  
31 Cable Office does a wonderful job, it may very well be that we have lots of folks within  
32 this County who are very knowledgeable and also very interested in laying out what  
33 they think is the, what might be wrong with what the Cable Office said. This provides an  
34 opportunity for an independent group of folks with whatever assistance they need, and  
35 with whatever may be the case, that is presented by the individual, it allows the  
36 individual another crack at the apple and if the Cable Compliance Commission says it  
37 disagreed with the Cable Office, that the Cable Office was wrong, and that service  
38 should have been provided, I think that sends a strong message back to the Cable  
39 Office to enforce the franchise.

40  
41 Councilmember SILVERMAN: Thank you.

42  
43 Council President PEREZ: Mr. Subin.

44



July 12, 2005

1 Councilmember SUBIN: Thank you, Mr. President. First question I have is for Ms.  
2 Healy and Mr. Hansen. What privity exists between the cable company and non-  
3 subscribers?  
4

5 MR. HANSEN: There is no privity of contract.  
6

7 MS. HEALY: [Inaudible]There's no privity.  
8

9 Councilmember SUBIN: Okay. So there is no relationship, no legal relationship between  
10 the two?  
11

12 MS. HEALY: No.  
13

14 Councilmember SUBIN: So, how would that play out in the Circuit Court if somebody, a  
15 potential subscriber, a potential eligible subscriber who didn't subscribe came in to sue  
16 Comcast for lack of service? Would they have standing?  
17

18 JANE LAWTON: No, they have requirements for our franchise.  
19

20 Councilmember SUBIN: Wait a minute I'm getting two answers here. They're saying  
21 there's no contractual relationship and you're saying that they would have standing  
22 under the contract to sue but they don't have a contract?  
23

24 SONYA HEALY: It would be a violation on the franchise agreement if they were  
25 supposed to provide service in a particular area and did not.  
26

27 So it would be a case on the merits of whether they passed a certain number of homes  
28 per mile in a particular area. But it's not a contract law issue in the sense of traditional  
29 contract law where you need privity to prove it.  
30

31 Councilmember SUBIN: So again, how would the courts treat that?  
32

33 MARC HANSEN: If a potential subscriber, a want to be subscriber were to file an illegal  
34 action in Circuit Court against Comcast, directly to try to enforce, to try to get an order  
35 requiring Comcast to extend service, I think they would have a very high hurdle to get  
36 over because there is no privity of contract between a potential subscriber and Comcast.  
37 They might try to make an argument of a third party beneficiary, but I think it would be  
38 very difficult for them to succeed on that.  
39

40 JANE LAWTON: Don't think about it in a big place where they they're real wide apart,  
41 think about it in the middle of Bethesda. There's a citizen in the house and they want  
42 service. And for whatever reason Comcast refuses them service. Under the terms of  
43 the franchise they have to give that person service unless there are some mitigating  
44 circumstances because he's just like his neighbor. He deserves service. So, I don't  
45 know, I'm not a lawyer, I don't know privity or contract law, but I know that they would



July 12, 2005

1 have standing to be able to say that our franchise requires that they get service just like  
2 their neighbor. And I don't know who'd be sued or who wouldn't be sued.

3  
4 Councilmember SUBIN: Well, that's a civil rights violation because you have disparate  
5 treatment.

6  
7 That is not an ability to sue directly under the contract. It's a totally different issue.

8  
9 JANE LAWTON: Well, they have a way to bring it because they do it all the time, all  
10 over the country there are cases like this.

11  
12 Councilmember SUBIN: But the County Attorney is saying there is a huge hurdle so  
13 clearly this issue, while the Executive supposedly has signed off on this, the County  
14 Attorney's office clearly has a question on what would happen if it went to court and  
15 those are the folks that ultimately we would have to rely on to defend this. And they're  
16 saying, big problem here. Would this apply to RCN?

17  
18 JANE LAWTON: Yes, it applies.

19  
20 Councilmember PRAISNER: In the franchise area that they have, it's in there.  
21 [overlapping speakers]

22  
23 JANE LAWTON: Yes.

24  
25 SONYA HEALY: In their particular terms.

26  
27 Councilmember SUBIN: So what you're saying is that this, the language in this Bill  
28 would allow somebody who lives out in the middle of nowhere to take both RCN and  
29 Comcast to court because or to --

30  
31 You know, one of the things that I've learned over the years here, is when folks start to  
32 argue back with semantical arguments, they don't have a strong foundation for what  
33 they are looking for. So I'll change this just for you. So if somebody then who lives out  
34 in the middle of nowhere decides to go to a judicial or a quasi-judicial venue to  
35 complain, then they now have the right to do that. Anybody who doesn't have service  
36 can go to, if this language goes, to a judicial or a quasi-judicial venue to demand that  
37 they get service.

38  
39 Councilmember SUBIN: Now, with those words, and those semantic corrections, yes or  
40 no? It's a simple answer. Yes or no. I don't want a paragraph here. Could they or  
41 could they not?

42  
43 DENNIS ROONEY: They could, yes.

44  
45 Councilmember SUBIN: Okay. So while I don't necessarily buy the floodgates argument  
46 because that's part of the Bolero syndrome from the Chamber, in fact, there is some



July 12, 2005

1 merit to that. Now, while it's not a floodgates argument, it is an argument that says  
2 you're going to give standing to folks who under any other circumstances would not  
3 have any. Now, my question to the County Attorney is, where else, in what other  
4 venues in County government do we do that?

5  
6 If somebody can't afford a Cadillac, can they go bring Cadillac to Consumer Affairs? I  
7 can't afford a Cadillac. Can I bring a suit against a Cadillac dealer to get me better  
8 access to a Cadillac? Or what about is anybody taking Verizon or somebody else to a  
9 judicial or quasi-judicial environment to do that?

10  
11 If somebody's not close enough to a park, can they go to court? Do we give them in  
12 legislation the right to go to court? Where else do we do this? Where somebody who  
13 would, in the words of the County Attorney, have a very high hurdle to meet, do we  
14 lower that hurdle.

15  
16 MARC HANSEN: One area would be the human rights law where there is, if I'm refused  
17 service for example, because I am a member of protected class I could file a complaint  
18 with the Human Rights Commission.

19  
20 Councilmember SUBIN: But that is federal law and they have those rights.

21  
22 Councilmember PRAISNER: You're talking about --

23  
24 County law.

25  
26 Councilmember SUBIN: 8, 9, 10.

27  
28 Councilmember SUBIN: The civil rights law, those folks are given that right by federal  
29 law and by the Supreme Court. We then codify it here. Where in federal law is  
30 somebody given standing who otherwise would not be given standing?

31  
32 Councilmember PRAISNER: Cable law.

33  
34 Councilmember SUBIN: The cable law gives them standing.

35  
36 Cite, please.

37  
38 Councilmember PRAISNER: I don't have it in front of me, Mr. Subin, but I believe the  
39 cable law provides consumer protection and this is consumer protection.

40  
41 Councilmember SUBIN: This is a huge step if you want to go and say, under consumer  
42 protection. It is consumer protection to subscribers, not to non-subscribers. This is not  
43 a public good, this is a privately given good under the franchise agreement. Not 100%  
44 of the County is guaranteed today, coverage by Comcast or by any other over builder.  
45 It's not fair. And so we are creating standing that just doesn't exist anywhere else. On  
46 the issue of service not being provided to a lessee by a lessor, what you're saying is,



July 12, 2005

1 that we are going to provide liability to Comcast for what the lessor does not provide.  
2 We can make faces, too.

3  
4 If a lessor cuts the telephone lines in a building, the lessee would take the lessor to  
5 court, not Verizon. Why are we distinguishing that here? That if the lessor cut the  
6 cable lines and doesn't receive service, that they would take Comcast to a judicial or  
7 quasi-judicial environment? What distinguishes the two? And if we can do that here,  
8 why can't we do that to Verizon, or Washington Gas or WSSC, or Pepco, or BG&E?  
9 Why couldn't we use this as the precedent? We didn't pick that out that the lessor didn't  
10 provide the services, the County Executive did. What distinguish the two? Okay, Mr.  
11 County Attorney, what distinguishes two?

12  
13 COUNTY ATTORNEY HANSEN: Well, between the lessor and the lessee example that  
14 you gave.

15  
16 Councilmember SUBIN: Which is, that's the question I'm asking.

17  
18 COUNTY ATTORNEY: Right. Between that situation and the situation where the cable  
19 service has been denied by the provider, there, the distinction, I think factually is that in  
20 both cases the provider, Verizon as you point out, or Comcast, in your first example,  
21 Verizon didn't cause the cut in service, whereas in the second case, at least as I  
22 understand it, it's Comcast.

23  
24 Councilmember SUBIN: No, I said or the lessor cuts the cable.

25  
26 COUNTY ATTORNEY: Right. Which is a third party.

27  
28 We intervene into the relationship.

29  
30 Councilmember SUBIN: Okay. And the County Executive's representatives said that the  
31 lessee is not receiving the services because of something that the lessor did, therefore  
32 they can go, according to this and what the County Executive said, they could then go  
33 to the Commission or somewhere else and say, we're going to force Comcast, we're  
34 going to try to force Comcast to come in and fix that.

35  
36 COUNTY ATTORNEY. Right.

37  
38 Right.

39  
40 Councilmember SUBIN: Well, not only do, from the numbers that we were given, do I  
41 not see a need for this but based on something that's really a non-problem, this  
42 language creates some incredible precedent that I don't believe if it went across the  
43 street, would be able to withstand the light of day. I think, the language is overly broad.  
44 There is no beginning and no end as to what would constitute a violation here. As Mr.  
45 Silverman said, there really is no remedy. I think we're creating some standing where  
46 there is none in terms of the issue of the two houses or my whole neighborhood gets it



July 12, 2005

1 and I don't. There are other issues involved here that really belong in the courts and not  
2 before the Commission. I don't think the Cable Commission should be hearing civil  
3 rights actions. And frankly, I don't see how you can force somebody to comply with the  
4 relationship that doesn't exist. If we're talking about a breach of the franchise  
5 agreement, we're talking about a breach of a public contract and the person can go  
6 across the street. Given all that, I'm going to move that the amendment, starting on  
7 Line 3, Circle 2, with the words from existing and ending on Line 4, from the Company,  
8 be deleted, and that the original verbiage which reads the Cable Compliance  
9 Commission is established to adjudicate subscribers and acts involving customer cable  
10 service or any other product of service be restored.

11  
12 SPEAKER: Second it.

13  
14 Council President PEREZ: Moved and second. Ms. Floreen, you had you light on for a  
15 while. I apologize. Are you done, Mr. Subin?

16  
17 Councilmember SUBIN: Yes.

18  
19 Councilmember FLOREEN: Thank you. We've had a lengthy debate here about the  
20 issue of eligibility for service but it seems to me that that's presupposed in the proposed  
21 language. It says that this would extend the Commission's oversight to folks who are  
22 eligible which means that determination has to be made before they could come to the  
23 Commission. I mean that's just what the language says here. So I am a little mystified  
24 about what this is intended to achieve. It's not intended to achieve a resolution of  
25 eligibility because that has to be resolved in some other form, I assume through your  
26 office, Jane, or maybe through the Office of Consumer Affairs if that is indeed an  
27 avenue, but this language doesn't say it's designed to resolve the eligibility issue which  
28 we've had a lot of conversation about, it's designed to resolve something else. What it  
29 is, is what I'm not clear about. Can someone tell me? The language says these  
30 proscriptive subscribers who have requested and are eligible. That means that that  
31 point has been resolved someplace.

32  
33 Councilmember PRAISNER: Nancy, from my perspective, the issue with the language,  
34 without having the language, is that the Commission did not believe it could look at a  
35 perspective subscriber. Part of the Commission's determination of eligibility or not  
36 would be an issue that they would be looking at, and I guess a presumption that they  
37 would review both the eligibility and the remedy as they work through the issue,  
38

39 Councilmember FLOREEN: But that's not what the language says.

40  
41 Councilmember PRAISNER : I understand what you're saying from a standpoint of  
42 saying existing subscribers or perspective subscribers. The rest of the language says,  
43 who have requested, and then it says are eligible, and your point I guess is someone  
44 has to determine they're eligible. I believe the complaint would be that I am a  
45 perspective subscriber and I believe I am eligible to receive service. That would be  
46 what the complainant would say and then the Commission would review the eligiblity



July 12, 2005

1 and the complaint, whatever that complaint might be. The individual is asserting that  
2 they believe they are eligible to receive service.

3  
4 Councilmember FLOREEN: Well, okay. But that's not what this language says and I  
5 think that's-- Pardon me?

6  
7 JANE LAWTON: This language doesn't come from us.

8  
9 Councilmember PRAISNER: I mean the deal.

10  
11 Councilmember FLOREEN: I don't doubt the goodwill here. It does not say that. So, I  
12 think that is indeed an issue because [inaudible] question of what it is that is to be  
13 resolved.

14  
15 JANE LAWTON: I take your point and I think ineligible.

16  
17 Councilmember FLOREEN: If it is, I honestly don't know what this fixes.

18  
19 Councilmember PRAISNER: It allows someone who believes that they are, who is not a  
20 subscriber--

21  
22 Councilmember FLOREEN: But it doesn't say that Ms. Praisner.

23  
24 Councilmember PRAISNER: I understand that but the-- our perspective subscriber--

25  
26 I understand that.

27  
28 But they say they believe they are eligible.

29  
30 Councilmember FLOREEN: But, it's not what it says. And I think that's, it raises.

31  
32 Councilmember PRAISNER: Well what would you recommend Ms. Floreen to remedy  
33 your concern?

34  
35 Councilmember FLOREEN: Well, I don't think this is solving a problem that we need to  
36 solve, let's put it that way.

37  
38 Councilmember PRAISNER: So you don't support anyone who isn't a subscriber being  
39 able to go to the Commission?

40  
41 Councilmember FLOREEN: Well, what I've understood from the explanation so far, and  
42 as you identified it at the beginning, there was the Office of Consumer Affairs and there  
43 is the Cable Office that would make that call. There is a franchise agreement that sets  
44 the standards. And apparently there's some disagreements periodically about how far  
45 you have to extend and so forth. But that's really kind of a black and white issue. The  
46 only question is, what is it that this would fix if you are ineligible, what's your complaint



July 12, 2005

1 that you're not getting the service in as soon as possible? I assume if that's the issue  
2 and at which point you would have a subscription agreement of some sort.

3  
4 Councilmember PRAISNER: Well, if you're a prospective subscriber you believe that  
5 you want to subscribe but you can't at this point. And you believe you're ineligible.

6  
7 Councilmember FLOREEN: Well then you're not eligible.

8  
9 Councilmember PRAISNER: You believe you're eligible.

10  
11 Councilmember FLOREEN: Well, but again, this language, if this is intended to fix that  
12 problem I would respectfully submit it doesn't do that. I am having a great deal of  
13 difficulty of understanding how a financial remedy addresses the basic issue which is  
14 access to an important utility service. That's not going to fix the issue of the ability to get  
15 put online. And it is certainly not going to address the issue of technical, I don't know if  
16 there's some sort of building issue or whatnot. That is pretty much an internal issue.  
17 It's unclear to me how a financial remedy addresses that particularly if there's some  
18 other resources out there now as between landlord tenant affairs, Jane's office, or the  
19 Office of Consumer Affairs. Does the Office of Consumer Affairs ever receive these  
20 kinds of complaints?

21  
22 You said that earlier. Ms. Praisner.

23  
24 Councilmember PRAISNER: No, what I said was that the consumer protection law of  
25 the County as it exists right now, does not extend only to current customers but also to  
26 perspective customers. And I didn't mean to suggest and if I did, I'm happy to have the  
27 opportunity to correct it. What my comment related to was a question about extension of  
28 something that is novel to someone who, by this legislation, to someone who does not  
29 have a contractual relationship and the point I was making is that in Chapter 11, which  
30 is the Consumer Protection Law of the County, Section 11.1 under "Definitions",  
31 "Consumer, meaning someone who has standing from a consumer perspective is not  
32 just purchaser, lessee or recipient, but is also a perspective purchaser, lessee, or  
33 recipient". I wasn't meaning to suggest that our consumer office at this point, is  
34 engaged in the issue of cable service, I was just trying to explain that in Montgomery  
35 County we already try to protect potential consumers.

36  
37 Councilmember FLOREEN: Well, that helps me. Mr. Hansen or, Office the Consumer  
38 Affairs in a position to resolve this issue right now if I had-- Well, again, I don't think this  
39 goes to eligibility because this is a presupposition of this language. But if it did, could I  
40 go to the Office of Consumer Affairs right now? Do you know?

41  
42 MARC HANSEN: I'm not exactly sure. I would think not. I think the jurisdiction over the  
43 cable complaints falls with the Cable Office and the Commission, not Consumer Affairs  
44 generally.



July 12, 2005

1 Councilmember FLOREEN: But I would, to the extent I wanted to follow-up, I would file  
2 a complaint with Jane right now? And that would be addressed through the franchise  
3 agreement.

4  
5 JANE LAWTON All of the complaints come to us first and I mean, you'll, that's, they all  
6 come to us. All the Cable Compliance Commission is, is an added layer. It doesn't  
7 replace our authority and we do these all the time.

8  
9 Councilmember FLOREEN: So, if I am in fact eligible to receive service, what would I be  
10 complaining about but haven't gotten it yet?

11  
12 I mean, what is it that I might complain about? All I can imagine is that it would be that  
13 my service has not been instituted.

14  
15 JANE LAWTON: If the company continued not to serve you, that's why you would be  
16 complaining. That's correct. It would be if we had said you were, and you had said you  
17 were, and we'd said you were, and the company was continuing not to serve you. Then  
18 they, you know, these are the kinds of things we see every day and they're not black  
19 and white. They are, many times it's a gray area. We try very hard to exercise our  
20 muscle to get things enforced and sometimes we succeed and sometimes we don't.  
21 You know, I think this is just your call whether you want this amendment or not. I don't  
22 think it's, you know, we'll deal with it either way.

23  
24 Councilmember FLOREEN: The point is, you will continue to deal with this issue. This  
25 is an issue that does not currently have access right now.

26  
27 JANE LAWTON It's just that that person, it's just that it is a place where people have  
28 been refused the opportunity to go to the Commission and I can't presuppose what their  
29 circumstances would be. In the one that it was, we thought he thought he was eligible,  
30 we thought he was eligible, and that's what he would have gone on. And as far as I  
31 know I presume he still doesn't have service. I don't know.

32  
33 Councilmember FLOREEN: Thank you.

34  
35 Council President PEREZ: Okay, I think. Mr. Leventhal.

36  
37 Councilmember LEVENTHAL: Well, just a few points. When I said earlier that this had  
38 been brought to my attention as something that I was going to need to focus on, clearly  
39 that was correct. We've had a lengthy, and that was the point. I mean we had a lengthy  
40 debate here over what I initially thought was a minor technical extension of the sunset  
41 date. So, Councilmembers have strong views on this topic. I didn't know that until after  
42 I woke up this morning. I sort of skimmed the packet. It sounded fairly pro forma. I just  
43 want to, I'm going to vote against it Mr. Subin's amendment. Let me just address a  
44 couple of things that have been said. The suggestion that cable TV is a private good  
45 not a public good, I think is not really accurate and not really consistent with the use of  
46 the County's right-of-way with the franchise agreement which should give residents of



July 12, 2005

1 Montgomery County access to cable TV. We provide on cable TV the public access  
2 channels including the ability to watch us right now. And the only way you can get that  
3 is through cable TV you can't get it on satellite. So that if we believe that it is in the  
4 public interest, if we believe that it is in the public interest colleagues, that those who  
5 pay the taxes and vote for us, are able to watch what we do in this body, then it seems  
6 to me that we, the elected representatives of those people have it upon us to ensure  
7 access to that service and that it is in fact a public good and we do have a public  
8 responsibility. I walked in this room this morning not knowing much about this issue and  
9 completely undecided as to how I was going to vote on it. I've listened to this  
10 conversation and I feel now strongly about the merits of this issue and I will vote against  
11 Mr. Subin's well-meaning amendment. When this was first presented to me, and I can  
12 understand how colleagues might say, well wait a minute, if you're not a subscriber you  
13 don't have standing, that's it. You don't have a contractual arrangement and what basis  
14 do you have to sue? I am listening carefully and what we are talking about in the  
15 language, Ms. Floreen, that states here is someone who is eligible should have  
16 recourse if they're not getting the service that they're eligible for. Now whether the  
17 Cable Commission has enough power, whether the Cable Commission has enough  
18 enforcement clout are other issues. But we have an existing structure. We're allowing it  
19 to continue for some years more, and the structure provides that if you're not satisfied  
20 by the activity of Jane Lawton's office you have the opportunity to appeal to this citizen  
21 Commission which was established a long time ago. And it makes sense to me that an  
22 individual who is eligible for service, as stated in Ms. Praisner's amendment, should  
23 have recourse, should have a place to go to get that service that they're eligible for.  
24 And if, for some reason, they don't get recourse from the Cable Office, just as other  
25 consumers who actually are lucky enough to be getting cable TV to those who are  
26 eligible for it and not getting it, it seems to me ought to have recourse. I have  
27 enormous respect for the Bethesda/Chevy Chase Chamber. They are one of the best  
28 organizations in the County. They've been, every time they've communicated with me  
29 they've been thorough and substantive, and I always appreciate interacting with them.  
30 On this issue, I just think that they're kind of misreading how this is going to work. I  
31 listened to this very carefully and you're talking about a small handful of people who  
32 believe they're entitled to service who aren't getting it, and it seems to me that the  
33 County Council ought to want them to get it at a minimum so that they can watch us do  
34 our work.

35  
36 Council President PEREZ: We can debate whether there's a public right. Boy, okay. Mr.  
37 Denis.

38  
39 Councilmember DENIS: Thank you. Maybe that will be a punishment for naughty  
40 children or something. No, in view of some of the comments, no matter how individual  
41 Councilmembers may feel about this particular amendment, I just wanted to say I  
42 believe that Jane Lawton and her shop, do an excellent job, that our regulations are  
43 strong, and are fairly administered.

44  
45 Thank you.

46



July 12, 2005

1 Council President PEREZ: Mr. Silverman.

2  
3 Councilmember SILVERMAN: Thank you, Mr. President. I'm going to support Mr.  
4 Subin's amendment because I actually think we have a remedy. The remedy is the  
5 office that is charged with enforcing the franchise agreement. This amendment, if it  
6 extends out to non-subscribers, will provide absolutely no relief to the person who  
7 believes they should get a right to cable and doesn't get from the cable company,  
8 except they might get \$1,000, which from a cost benefit analysis, I'm sure is a lot less  
9 painful for a cable company to pay than the cost of running lines where they don't think  
10 it's there. I believe that we have a remedy and the remedy is the office, and the  
11 franchise agreement is the enforcement tool and that's what I would expect the Cable  
12 Compliance Office to be doing on a regular basis which I know they do. And that's why  
13 I'm not supporting this. We have a lot of, well, let me try it a different way. You can file  
14 complaints with the Office of Consumer Affairs alleging violations of Montgomery  
15 County's consumer protection statute. We don't have at Commission set up for that.  
16 The remedy is the office provides enforcement or you can bring a private right of action.  
17 So there certainly is ample examples of folks who can bring actions through the Office  
18 of Consumer Affairs, they don't go to a Commission. This Commission was set up, I  
19 think it's been doing a great job. I'm sure it's had good results. It's pretty clear that it's  
20 had an impact and I just think that that this particular type of complaint is best resolved  
21 through the office that I think is charged with the responsibility for enforcing the  
22 franchise agreement. Since the remedy is effectively an order to Comcast or Starpower  
23 to provide service where they're not providing it, and since the Commission doesn't  
24 have authority to do that, I don't see the point in extending out a remedy, a belief that  
25 there's a remedy to somebody who actually can't get the remedy.

26  
27 Council President PEREZ: Mr. Andrews.

28  
29 Councilmember ANDREWS: Thank you. I'm going to oppose the amendment and I  
30 certainly do think that the Office of Consumer Affairs and the Office of Cable does an  
31 excellent job. But it's ironic I think, that we have more protection in the law right now for  
32 what one could argue are private goods when you go to a car dealer, for example, and  
33 there's a bait and switch, you're not a customer but you've the right to make a  
34 complaint about that. But why would we treat cable, perspective customers as second  
35 class consumers and not give them that same protection when what they are seeking is  
36 certainly arguably more of a public good than, because it's information. It's information  
37 about all kinds of things that may affect their lives versus a tangible consumer product  
38 that does not have that purpose. So it seems to me that we should provide the same  
39 protection to people who are seeking access to public information that has become the  
40 norm in terms of what people have in this County. It's not an elite product, it's  
41 something that the great majority of residents have access to. And if indeed they have  
42 access to it as well under the cable franchise, it seems to me they should have the  
43 ability to go to the compliance board as anybody else out there who's going out to  
44 purchase a consumer good and is jerked around, has the right to file a complaint with  
45 the Office of Consumer Affairs? Why wouldn't we provide the same treatment?



July 12, 2005

1 Council President PEREZ: Mr. Silverman.

2  
3 Councilmember SILVERMAN: I'm sorry to play point counter point here but, I thought  
4 what I was trying to say, which I believe is what we've heard, which is very different than  
5 the point Mr. Andrews just made, is that the current law provides a remedy, just like if  
6 somebody goes to get their car repaired, they can file a complaint with the Office of  
7 Consumer Affairs. If a person wants cable service and can't get it, they can file a  
8 complaint with Jane Lawton. And it either gets resolved or it doesn't get resolved. In  
9 fact, we provide right now more remedies available to the consumer of cable services,  
10 including Internet, than we do to the person who goes to an auto repair facility.  
11 Because guess what? If the Office of Cable Compliance doesn't resolve the issue, you  
12 can go to a Commission. No such Commission exists to handle consumer complains  
13 involving auto repair. If the Office of Consumer Affairs says, you know, we tried we  
14 couldn't resolve it. That's it. Your remedy is to go to court. Right now there is a remedy  
15 and the remedy is the franchise agreement. So I respectfully say that to suggest that  
16 somehow if we don't pass this, we are leaving cable, would be cable subscribers without  
17 a remedy, is inaccurate. The issue here is whether they have another bite at the apple  
18 through this Commission or whether we expect that the decision that is going to be  
19 made about a remedy in the hands of the office that is charged with that responsibility.

20  
21 Council President PEREZ: Okay. I think the motion has been made, seconded.  
22 Debated, redebated and debated one more time. So all those in favor signify by raising  
23 your hand. Mr. Denis, Mr. Subin, Mr. Silverman, Ms. Floreen, Mr. Knapp opposed. Mr.  
24 Andrews, Ms. Praisner, Mr. Leventhal and myself. It passes 5 to 4, so it is stricken.  
25 Anything else on this, Ms. Praisner, before we go for a final vote? Councilmember  
26 PRAISNER: No.

27  
28 Council President PEREZ: Okay. Clerk will call the roll.

29  
30 County Clerk LAUER: Mr. Denis -- Yes. Ms. Floreen -- Yes.

31  
32 Mr. Subin -- Yes.

33  
34 Mr. Silverman -- Yes.

35  
36 Mr. Knapp -- Yes.

37  
38 Mr. Andrews -- Yes.

39  
40 Ms. Praisner -- Yes.

41  
42 Mr. Leventhal -- Yes.

43  
44 Mr. Perez -- Yes.



July 12, 2005

1 Council President PEREZ: The Bill passes 9-0. Okay. Let's move away from the easy  
2 stuff and turn to Item 7, Resolution to Extend Time for, it's our monthly resolution to  
3 extend time for Council action on the Shady Grove Sector Plan until September 13,  
4 2005 moved and seconded. All those in favor. Unanimous. Let's turn to our final item  
5 for the morning which is Zoning Text Amendment 03-27, Building Height Measurement.  
6 My intent on this is to take us until 12:30. If we're able to complete our discussion by  
7 then, great. If not we'll see where it goes if we have to reconvene at 1:30 we can do that  
8 because we have a relatively short scheduled this afternoon. So, if we have to do that.  
9 But we will go from now until 12:30 and then reconvene if necessary this afternoon to  
10 take this up. We would take it up after the Public Hearings, not before the Public  
11 Hearings. So, let me turn to the Chair of the Committee and then, I know, the sponsor  
12 of the Bill may have some introductory remarks that he wants to make as well, so, Mr.  
13 Silverman.

14  
15 Councilmember SILVERMAN: Thank you, Mr. President. Well, you know, I got on the  
16 Council in December 1998 having missed the very exciting discussion that the previous  
17 Council had on the issue of mansionization. And I almost escaped that.

18  
19 Councilmember PRAISNER: It grows on you, Steve.

20  
21 Councilmember SILVERMAN: So, let's see, a Bill gets introduced. It's extremely  
22 controversial. It's sent off to a working group. They can't really reach agreement. They  
23 discuss building heights, they discuss how you're going to measure from the average  
24 height.

25  
26 Council President PEREZ: You're talking about the PIF policy—

27  
28 Councilmember SILVERMAN: And then the Council votes on the legislation.

29  
30 If that sounds familiar, it's because that's exactly what happened eight years ago when  
31 similar legislation was introduced. For those keeping score, the Bill that was introduced  
32 suggested at the time, the Council at least suggested based on the working group that  
33 there would be further study on the issue of lowering the height, measuring height, from  
34 average around the perimeter of the home and the use of floor area ratio to prevent  
35 excess bulk. The Council approved the working group recommendations at the time  
36 and the issues for further study apparently went off into the sunset until they're back, at  
37 least some of them are back. I'm going to try to work through this, I'm going to mostly  
38 try to, which is very hard for me as a lawyer, try to speak English. I would respectfully  
39 say if the Council President, the way we handled this in Committee, and I'll defer to the  
40 Council President's judgment on this was, to allow representatives of the building  
41 industry and representatives usually in the form of Carol Green, to sit at the table, to be  
42 able to answer questions that PHED Committee members had and to respond to  
43 comments that had been made. I'll defer to the Council President's decision about  
44 whether we need to get into that at any particular time. But given how thorny an issue it  
45 is, I would assume that there'll be questions that may be asked of those folks beyond  
46 Ralph, the County Attorney and Susan, who's here on behalf of DPS. Let me just start



July 12, 2005

1 by thanking the sponsor of the legislation, Mr. Denis, for his work on this issue. There's  
2 such an extraordinary amount of information out there that even with the benefit of  
3 kibbitzing on the side from architects, engineers, people who live next to big houses and  
4 the like, it's very hard without actually seeing the houses and seeing drawings to  
5 understand what the real impact of the legislation will be regardless of what actually  
6 comes out of the Council. But, I appreciate the work of the sponsor on this. I  
7 appreciate the work of Ralph Wilson and the Staff group that came up with some  
8 agreement and some other areas which are not in agreement. So let me say what I  
9 believe, at least overarching, we have all agreed on that this legislation will do, which is  
10 to get rid of the terrace loophole. Now we'll get into extensive discussion about whether  
11 what comes out of the Council if it is in fact the Committee recommendations makes the  
12 issue worse or not, I don't know we'll hear from everybody that the Council President  
13 wants to hear from. But I do want to ask the department about this. So, let's work  
14 through this, issue by issue. I don't know if Mr. Denis wants to make any opening  
15 comments or not.

16

17 Councilmember Denis: Mr. President, I would be pleased to wait the Chairman's report  
18 and members of the Committee before weighing in, but whatever procedure you want to  
19 follow is okay with me.

20

21 Council President PEREZ: If we do need to make.

22

23 [overlapping speakers].

24

25 Council President PEREZ: I mean, we obviously may need to have some questions  
26 answered. So I think the practice you followed in the Committee is certainly something  
27 we can do here if necessary. Although we'll obviously try to be succinct.

28

29 Easier said than done.

30

31 Council President PEREZ: Yes. Ms. Floreen.

32

33 Councilmember FLOREEN: Well I just want to comment at the outset. This is an issue  
34 that I've been involved with for 20 years and Carol Green has my file from when I got  
35 involved in civic life by challenging the height of a building, which was built on a terrace.  
36 All these things. And of course it's disturbing to see that enforcement issues remain the  
37 same as they have evidenced out in Clarksburg recently. But the other point of this is  
38 that it's incredibly dense and complicated and the challenge with the whole  
39 mansionization kind of issue, and the height solution is coming up with an answer that  
40 addresses all the community needs. And I think we'll get into this here. But I do think  
41 it's important for everybody to appreciate the challenge of coming up with an envelope,  
42 a building envelope, that respects community needs, existing communities, as well as  
43 the conflicts between existing homes and new homes which this is all about. It seems  
44 like it should be a simple solution but alas, I don't think it is at all. So I just want to  
45 comment on that before we get into it. Thank you.

46



July 12, 2005

1 Council President PEREZ: Ms. Praisner.

2  
3 Councilmember PRAISNER: I wanted to comment too, that unfortunately, because of  
4 obligations on an educational funding task force I was not able to attend the last  
5 meeting. I did include, and I appreciate Ralph's including within the packet, my memo  
6 to the Committee. Unfortunately, at that point in the Committee conversation, not  
7 having the benefit of the visuals which I had hoped we would, I hoped the screen would  
8 be lowered so that, at this point so that we could have some visuals because I really do  
9 believe that the discussion is supported when we have a chance to look at either  
10 hypotheticals or actuals, that may be houses that exist or the way the departments may  
11 or may not be calculating height. In the packet you have my comments on some of the  
12 issues. I agree, having been here for the mansionization discussion, that is a  
13 complicated issue. I unfortunately have to relate this to the art discussion that we're  
14 having now, or the fact that the press has also related to the issue of what may or may  
15 not be occurring in Clarksburg right now, because I see this not just as an infill property  
16 issue, but a way in which we approach measurement issues and we calculate height  
17 and setbacks. And I think Ms. Floreen is correct. I drive downtown Silver Spring and  
18 think of Nancy often when we go by certain buildings. Obviously, it's more dramatic, I  
19 believe, unless you happen to live at the edge of central business districts, it's more  
20 dramatic when you're talking about a redevelopment or a new development occurring  
21 next to your home. And so I hope we'll have some conversation, comprehensive about  
22 the calculation issues and the implications. I did not make comments in my memo  
23 about the height issue, because I was not able to have the benefit of the Committee's  
24 conversation. There are two issues that I do want to make a comment about. I hope  
25 we will have some conversation about the County Attorney's opinion of what or what not  
26 is eligible for modification, given the advertisement for this zoning text amendment. I'm  
27 still having problems understanding what is not eligible for consideration based on the  
28 determinations I respect very much Mr. Royalty, enjoy working with him on a variety of  
29 issues. But on this one, he's got to explain a little more to me. The other point I want to  
30 make is, while I appreciate individuals' desires to make modifications to homes they  
31 may have lived in, or homes they may want to buy, I have a real problem with the  
32 builders' arguments that because people want higher ceilings, we should give them  
33 what they want. And I take great difference with their attempt to equate that to the  
34 movement of outhouses into buildings, or the introduction of fireplaces in homes or the  
35 inclusion of kitchens which used to be in separate buildings outside of a house or a  
36 domicile area, into a house. There are big differences in incorporating the evolution of  
37 housing and suggesting that just because someone wants a 10-foot ceiling that that is a  
38 need that must be responded to. For those of us who have been living in houses with  
39 ceilings much lower than that for some time, I really don't think I'm deprived by that. Nor  
40 do I think that we should suggest that just because someone wants something, this  
41 County or this community needs to respond dramatically and allow it to happen.  
42 Especially where it has a negative impact on those who may live nearby or dramatically  
43 changes the dynamics and general gestalt of a neighborhood. I do not intend to  
44 genuflect on the holy grail of ceiling height. Nor do I think it should be something that  
45 drives our decisions on these issues. If folks only want to look at houses with higher  
46 heights, then I would respectfully recommend that there are lots of those elsewhere.



July 12, 2005

1  
2 Council President PEREZ: Mr. Denis.  
3  
4 Councilmember Denis: Thank you, Mr. President. I just want to clarify. Are we  
5 considering what is known as the version amended by Council Staff on Circle 5? Is that  
6 what's before the Council because there are different versions of the Bill, and I just want  
7 to clarify that what is on Circle 5 is what we are working off of.  
8  
9 RALPH WILSON: I think it is. It's scheduled for action today so I felt you needed  
10 something to act on. What I did includes the three or four conclusions that were  
11 reached by the Council members that were in attendance at that second work session  
12 plus what thought was consistent with the direction they were going in those other  
13 areas. It's a point of departure.  
14  
15 Councilmember SILVERMAN: If I may, I don't mean to interrupt, so we're talking about  
16 Circle 5 amended by Council Staff. But that's really the Committee--  
17  
18 RALPH WILSON: It's not my Bill but it's --.  
19  
20 Councilmember Denis: I know that.  
21  
22 Thank you for that clarification.  
23  
24 Councilmember PRAISNER: The 10th Councilmember.  
25  
26 Councilmember SILVERMAN: It is, I believe, the recommendations of the majority of the  
27 PHED Committee.  
28  
29 Councilmember DENIS: So, and as it says amended by Council Staff, to fill in the  
30 blanks or. I want to make sure that's the version that we're working from.  
31  
32 Yes.  
33  
34 Councilmember DENIS: Thank you, Mr. President. Two things that I keep with me at all  
35 times,  
36  
37 Councilmember PEREZ: the AGP.  
38  
39 Councilmember DENIS: What's that. AGP no, that's not one. But the U.S. Constitution  
40 and the County Charter. Two documents that are distinguished by their brevity.  
41 Believe it and eloquence. Believe it or not, nowhere in either of the documents can you  
42 find any reference to building height, although, curiously enough, there actually is a  
43 federal law on building height. It's not generally known, but no building in the nation's  
44 capital is permitted to be higher than the Capitol Building. Now how that is measured I  
45 don't know. I mean we're not suggesting that buildings be as high as the Capitol, and  
46 it's called Capitol Hill for a good reason, it's on a terrace. It's on a hill. But that is



July 12, 2005

1 actually one of the reasons why you do not have higher structures in the District of  
2 Columbia. But that's just an historical aside. It may very well be that building height is  
3 the third rail of Montgomery County government. Whether it be a mixed use project on  
4 Arlington Road in Bethesda, a new community in Clarksburg, or older communities  
5 within the beltway, limits are important and should be respected. This Bill arises from  
6 the impact of new home construction on older, well-established neighborhoods. This  
7 has been a source of concern for me and many others for some time. In the last  
8 century, before I became a member of this august body, Councilmember Mike Subin  
9 was a sponsor of legislation which involved these issues along with two of his  
10 colleagues at the time, my predecessor, Betty Ann Krahnke and then Councilmember  
11 Ike Leggett. I am honored to have Councilmember Subin as a sponsor of this century's  
12 legislation. I introduced this zoning text amendment on November 25, '03, a Public  
13 Hearing was held January 13, '04. A working group held numerous meetings with all  
14 stakeholders including the builders. The Planning Committee held several work  
15 sessions, the most recent June 24, '05. We participated in annual mansionization  
16 conferences, most recently on April 9, '05 attended by over 200 residents and actually a  
17 quorum of the County Council on a beautiful Saturday morning in Washington Grove.  
18 Many County residents have asked for help on this issue and provided expertise and  
19 diligence to craft a legislative response.

20  
21 The attachments in the packet are very impressive. And as to the point raised by  
22 having to see what it is we're talking about, for those who haven't gone on any of the  
23 many tours that I and other Councilmembers have experienced, I would call your  
24 attention to Circle 22, the attachment by Sue Kelly, a resident of Chevy Chase who is  
25 an architect and has very precise pictures and illustrations to make the point that this  
26 Bill seeks to make. They all describe, all of these attachments, the issue very clearly of  
27 one of compatibility and neighborhood character and have identified the height of new  
28 homes to be the primary culprit. They further highlighted as a major problem, the  
29 terrace height exemption in the zoning law. This issue is complex, but doing nothing in  
30 the face of all these legitimate concerns is not an appropriate response. I thank my  
31 colleagues on the Planning Committee for their hard work. Steve Silverman, the Chair,  
32 and members Nancy Floreen, and Marilyn Praisner. They are all particularly  
33 knowledgeable about the zoning ordinance and the building permit approval process.  
34 So we've been at this for a long time. The amended Bill changes how we measure the  
35 height of homes in the smaller lot areas of the County. Under the amended bill, the  
36 process would be more streamlined. Predictability and foreseeability are obviously  
37 important. The Department's actions, the Department of Permitting Services actions,  
38 would hopefully then be more consistent and understandable and should serve to  
39 increase the public's trust. The Bill as amended changes the point at which we begin to  
40 measure height, in effect changing where we put the measuring stick. It has been at  
41 street level. It would now be, under the Committee amendments, at the front of the  
42 house, taking an average of what is called the finished front grade. The Bill also  
43 eliminates any consideration of terraces. Current practice permits a credit for the height  
44 of a terrace which is an administrative complication and an opportunity to artificially  
45 increase the height by piling up dirt. This was an essential element of my original Bill.  
46 Most of us understand the terrace as a rise in the grade, a tall hill or a small hill. The



July 12, 2005

1 difference in height from the street to the front of the house. Nearly all the concerns that  
2 have been expressed to me are from owners of older homes, up to two and a half  
3 stories tall but less than 35 feet. Some of the new homes being complained of, are also  
4 technically, two and a half stories but many end up towering over their neighbors and  
5 threatening to change the long established character of a community. This is because  
6 we now measure height to the mid point of a roof, regardless of the slope. So for all  
7 practical purposes, the current practice is not actually a height limit at all. And with the  
8 greatest respect, neither is the amended Bill.

9  
10 As a compromise to the actions taken by the Committee, I would like to keep the current  
11 provision for measuring height to the mid point of a roof and reduce the maximum  
12 height of replacement homes in the R60 and R90 zones to 30 feet, including new  
13 homes that abut existing homes and renovations. This is a compromise that I would like  
14 to offer. It's in the nature of government that you never achieve everything you would  
15 like to achieve. Success is measured in terms of progress, and I do believe that  
16 substantial progress would be achieved with the addition of my amendment to the Bill.  
17 My Bill, the original Bill, would have lowered building height. While technical and  
18 corrective changes are welcomed, the net result of what the Committee has done could  
19 be to raise building height. Moreover, a Staff opinion, confirmed by a County Attorney's  
20 opinion, asserts that a defect in the notice of the Committee's Public Hearing, makes it  
21 impossible for the Council to consider the amendment just described. The amendment I  
22 have just described I would repeat, I would like to propose this amendment as a  
23 compromise compatible with other Committee amendments would lower building height.  
24 I have the greatest respect for the County Attorney's office and the author of the  
25 opinion, Cliff Royalty, I want to thank the County Attorney's office for their prompt  
26 response to request for an opinion based upon the Staff opinion. But I had occasion  
27 frequently when I was in the State Senate, to deal with Attorney General's opinions with  
28 which I had some agreement. We used to refer to them as hostile opinions when they  
29 prevented us from doing what we wanted to do, or denied us the opportunity to stop  
30 what we wanted to stop, but at no time did I ever lose any respect for the integrity of the  
31 office.

32  
33 And as the courts have had occasion to remark many times with regard to Attorney  
34 General's opinions at the state level and with County Attorney's opinions at the County  
35 level, it is just an opinion. I'm a county attorney, I have my opinion. My amendment's in  
36 order. But I'm not the County Attorney. Just as I used to say in the State Senate, I'm a  
37 general attorney, not the Attorney General.

38  
39 But I realize that the County Attorney's opinion is entitled to respect and I give it respect.  
40 But just as I differed with the County Attorney on prescription drugs, just as a majority of  
41 the Council has differed with the County Attorney on different views, and just as the  
42 County Attorney's opinion has not always prevailed in Court, I would respectfully  
43 suggest that the County Attorney's opinion is in error. The courts have repeatedly said  
44 that it is they that make the law and interpret the law, not the Attorney General, not the  
45 County Attorney and we all understand that, and that's how it should be. I would point  
46 out that in the purpose clause of my original Bill, the actual original Bill that's in the



July 12, 2005

1 packet, the purpose clause describes the Bill as "revising the method for calculating  
2 building height." How could an amendment on building height be out of order under  
3 those circumstances? And I would also point out that the numerous witnesses, over a  
4 period of years, who have addressed this very issue of building height, both pro and  
5 con, realize quite well that this Bill deals with building height. So it's incomprehensible  
6 to me that there could be any misunderstanding on this particular point. Is there no  
7 level of deep detail too arcane, not to require the careful attention of the Council? We  
8 are talking about a notice, advertising a Public Hearing. My goal is to amend the  
9 version of ZTA 03-27 now on the floor so that it is closer to my text amendment as  
10 introduced on November 25, 2003, and to follow the contours of the consensus  
11 captured in my April 11 memo to the Committee. My goal all along, has been to simplify  
12 how we determine the height of homes in the R60 and R90 zones and ensure that the  
13 law is so clear that implementation and enforcement pose no challenge. In summary, I  
14 propose the following, and some of these are Committee amendments and you'll realize  
15 the substantive amendment that knocks up against the County Attorney's opinion as I  
16 go through this. Seven major points. One, that this should apply to residential  
17 construction in the R60 and R90 zones. That we change how we measure the height in  
18 these zones to conform the starting point of the measurement to the methodology  
19 applied in other zones by using the average elevation of the finished grade of the front  
20 of the building. Three, that we limit the maximum finished grade to the predevelopment  
21 grade. Four, that we eliminate the terrace credit. Five, that we change the ending point  
22 of the measurement to 30 feet at the mid point of the roof. Six, that we apply the new  
23 standards to replacement homes, additions, renovations, and homes in new  
24 subdivisions that abut existing homes. Seven, that we exempt from the changes any  
25 homes constructed with a building permit issued prior to the effective date of this zoning  
26 text amendment and also exempt homes constructed with a building permit for which  
27 an application was complete before the effective date. In concluding, I'd just like to  
28 thank my Staff, Ken Hartman, my confidential aide, and Teddy Osias, who has been  
29 pinch hitting so admirably for Ken while he is on leave. Thank you, Mr. President.

30  
31 Council President PEREZ: Okay. You've put those 7 items on the table. All those in  
32 favor? Very clear. Before I turn to Mr. Subin, I wanted to again note that rapidly  
33 concluding that go there are no new issues on the Council, we simply recycle issues.  
34 And that may be the theme of the months ahead as we take up the PIF policy and we  
35 do mansionization and I'm looking forward to this discussion. I appreciate Mr. Subin's  
36 leadership a few years back in bringing this issue to the floor. It was knotty then and it's  
37 knotty now. There were three values that I think our important in this discussion and  
38 they are for me at least, simplicity, transparency, and predictability. I think if I were a  
39 member of the public, I would want those values, something I could understand without  
40 having to hire a land use lawyer. Something that is transparent and something that  
41 gives me certainty and that's something I hear with regularity from the development  
42 community and it's a fair request that we want to know what the rules of engagement  
43 are and we want them to be predictable. Those are very fair requests. I must observe  
44 in the context of this building height debate that I'm not, we may be batting 0 for 3 and I  
45 don't know that that helps anyone because the muddled nature of this, I think, has all  
46 sorts of ramifications. We see it in Clarksburg. And if there's one thing I hope comes



July 12, 2005

1 out of this debate today, and in the Clarksburg context, I for the life of me don't  
2 understand why the term story is now part, continues to be part of the lexicon of our  
3 zoning code. Because story is, without very, very, very precise definition, is not simple.  
4 It's not transparent. It's in the eye of the beholder and it creates all sorts of potential for  
5 ambiguity. And we see it in Clarksburg, we see it in other building height settings and I  
6 hope that somebody can educate me. I'm sure there was a point in time where it was a  
7 useful construct in our zoning code. I think that that point in time has come and gone.  
8 And I don't know if this will be the vehicle to address that or whether there will be other  
9 suggestions that will come out of the Clarksburg review that will enable us to do  
10 something, but that is a word that has outlived its usefulness. So to put it differently, a  
11 story is something I should tell to my children at night before they go to bed. And so I  
12 hope we can deal with that. I also hope that we can have a discussion as we go  
13 through this about the doctrine of unintended consequences, because I want to make  
14 sure that as we think through all of the ramifications of what we're doing, we really have  
15 thought through it completely. Because I'm still getting a handle on the issue of  
16 precisely what problem, in what context we are trying to solve. I understand the  
17 problem as it relates to places like Kensington and Bethesda where you have  
18 established neighborhoods, but that's not the only setting in which potentially we could  
19 be doing this. So I hope we can have that discussion and I hope we can end up with a  
20 product that does at least get us closer to the issues of simplicity, transparency, and  
21 certainty/predictability because I'm not sure we have them right now. I appreciate the  
22 fact that Mr. Subin tried to do this a few years ago and Mr. Denis is trying to do this now.  
23 And I look forward to this discussion. So, Mr. Subin and then I'll turn it back to Mr.  
24 Silverman to maybe we can start on what we agree with and go from there.

25  
26 Councilmember SUBIN. Thank you Mr. President and thank you Mr. Denis for bringing  
27 this back up. You're bringing this back up, Mr. Denis proves to me, once again, you  
28 hang around here long enough, your defeats could turn into victories at some point,  
29 your victories could turn into defeats. Been on both sides of that. Let me start off, Mr.  
30 President, you asked the question, what is the problem? And the problem today, I think  
31 is the same as it was when we last tried to address this with Ms. Krahnke. And the  
32 issue is integrity of neighborhoods, integrity of plans, and the ability to have some  
33 predictability in the system. And for people in neighborhoods, anywhere, who buy a  
34 home, that home is the largest purchase in their life for many, although I guess the trend  
35 today is away from this, but I think at some point when the market slows down, we'll get  
36 back to this, it is a long-term investment. And they're not going to be moving from  
37 neighborhood to neighborhood. And they're going to have children and they're going to  
38 be there. And so when they move into those homes and into those neighborhoods, that  
39 that move on their part represents a dream of some sort. And it's based on what is  
40 there not continual changes. It is more important today than it was five years ago, or  
41 whenever Ms. Krahnke and I first addressed this, because after we finish up with Shady  
42 Grove, and hopefully after somehow we straighten out Clarksburg, the big issue, in  
43 terms of growth and development is going to be infill. And the more folks are going to  
44 rely on infill for their living and the more folks are going to rely on infill for their new  
45 homes, the bigger this problem is going to be unless we can get our arms around the  
46 issue and put some more integrity into the process. By allowing willie-nillie standards



July 12, 2005

1 or things to change based on market forces all the time, we'll take that integrity and  
2 predictability out of the system. Mr. President, you made a statement about Clarksburg  
3 and stories and I think you're absolutely right on both counts. What is a story? It's  
4 something vague. People can start to like more height in their bedrooms and everything  
5 starts to go higher. That's going to take the integrity and predictability out of the system.  
6 Clarksburg was a warning. And at this point I'm not interested in fixing the blame; I'm  
7 interested in fixing the problem. And so we need to start just coincidentally today by  
8 fixing the problem by saying we are going to get some greater control to put that  
9 integrity and predictability into the system so that people living in neighborhoods, in their  
10 dream houses, where their dreams are going to be made, don't have to worry about the  
11 sunlight that's in their backyard being blocked out, the view that they have not being  
12 blocked out because somebody wants an extra 4 or 5, 6 or 7 feet added on to their  
13 house. They don't want those dreams destroyed because somebody buys two lots or  
14 one lot for a high price and the first thing that happens is the structure that's there is torn  
15 down and they start all over again. Not an unknown event in Montgomery County  
16 today. It's probably happening as we speak. That the sales are being made or the  
17 houses are being torn down. So, I do want to thank Mr. Denis for bringing this back and  
18 giving this issue a new life. It may be Jason, but frankly all issues around here, over  
19 time, tend to be Jason and they rear their ugly or pretty heads back up. Denis, I think  
20 this Jason is very good-looking. Thank you.

21  
22 Councilmember SILVERMAN: Okay. Council President PEREZ: Mr. Leventhal has the  
23 [inaudible]. Mr. Leventhal.

24  
25 Councilmember LEVENTHAL: Well, I just wanted to say I really appreciate Mr. Subin's  
26 comments. I'm going to advance a radical notion that I'll probably get criticized for, but I  
27 think home builders ought to be able to earn a living. And having said that, having seen  
28 a lot of the homes that have caused this political controversy, I think they push the  
29 envelope so far that they are going to create more difficulty and more backlash for the  
30 homebuilding industry than I think any of us would, that would more than would be good  
31 for any of us. Either the industry itself or those of us who represent this community and  
32 have to deal with political controversies like this. So, I appreciate what Mr. Subin said  
33 and I appreciate Mr. Denis' proposals and my hope will be that whatever the Council  
34 ends up doing on this, that the industry itself, and I've had this conversation with the  
35 MNCBIA, will continue as I know most of the good actors in the industry do, to build  
36 homes and renovate homes and reconstruct homes and build additions to homes that  
37 are aesthetically pleasing and that are in keeping with the things that make living in  
38 Montgomery County so special. And by and large, I'm confident that when the homes  
39 that are constructed fit within those broad definitions, aesthetically pleasing and in  
40 keeping with the aspects of living here that make living here so special, there won't be  
41 any problem. And whether it's 30 feet or 35 feet, I've seen homes that are significant  
42 additions that the homeowners wanted, someday I hope to build an addition on my  
43 home, I'll probably have to leave the County Council before I can afford it, that people  
44 will be able to renovate their homes, that people will be able to improve the value of  
45 their property, and that they'll be able to do so within guidelines and within reasonable  
46 constraints that don't offend the eye and that don't offend the neighbors, and that can



July 12, 2005

1 still earn a reasonable profit for the contractors and for the home builders and I believe  
2 that there's a way that we can achieve those goals and I think that Mr. Denis is trying  
3 very, very hard to respond to a real problem that has been created by some  
4 homeowners who want, want, want, want. And by some contractors and builders who  
5 have built structures, and I don't think the entire industry is responsible for this, that are  
6 offensive to the eye and that are not in keeping with what people want in their  
7 neighborhoods. So, I believe there's a way that we can find that once we've resolved  
8 this matter, contractors and home builders can still make money, people can still  
9 improve the value of their property, but we don't have to really harm the special  
10 qualities of some of the longest-established neighborhoods and some of the densest  
11 neighborhoods with the smallest lots in the County.

12  
13 Councilmember SILVERMAN: Okay. Let's turn to Page 2 of the packet and we'll just  
14 start to work our way through these issues. The first, and I guess, you know, we'll see  
15 whose lights go on in terms of proposed changes. The first one is the Committee, and  
16 Ms. Praisner, if I'm characterizing you, and I'm sure you will comment about this, but I'm  
17 just looking at what I'm reading here. I believe the Committee unanimously agreed to  
18 limit the zoning text amendment to residential construction in R60 and R90 zones. We  
19 will get to the issue of additions versus new construction later. But right now, we're just  
20 talking about it applying to residential construction in R60 and R90 zones.

21  
22 Council President PEREZ: If we were to, if we had a map of Montgomery County and  
23 we geo-mapped the R60 and R90 zones, where would they --

24  
25 RALPH WILSON: You would find most of it in Down County areas, some in the East  
26 part of the County, but most of the Up County is different zones, larger lotting cases,  
27 mixed use development that sort of thing.

28  
29 Councilmember PRAISNER: The only comment I wanted to make is that as my memo  
30 indicates, and as my colleagues have indicated, this has a tendency to have a cycle and  
31 I don't think that whatever we come up with is the end of this issue, whether one agrees  
32 with the County Attorney or not. And so my point was, I'm willing to limit this to the R60,  
33 R90 zones at this time, but I respectfully suggest that that may not be the length and  
34 breadth of the issue we need to look at. It is the most dramatic areas because of the  
35 smaller zones, smaller lots.

36  
37 Council President PEREZ: Ms. Floreen?

38  
39 Councilmember FLOREEN: One thought that has just recently occurred to me and one  
40 we never discussed in Committee, is the applicability to townhomes and MPDU  
41 construction. Is there likely to be a burden on the production of MPDUs or townhomes?  
42 Have we worried about that sufficiently? There was a, I don't remember what the  
43 townhouse height issue is.

44  
45 RALPH WILSON: It's 35. The same family residential. In the few instances other than  
46 MPDUs, when you can cluster, there are certain circumstances in the R60 zone that



July 12, 2005

1 you can cluster with townhouses and you can build townhouses in connection with  
2 MPDUs. But it would apply to the MPDU townhouse development as well as single  
3 family, as it's now constructed.

4  
5 Councilmember FLOREEN: And there currently is a provision, how we proposed it so  
6 far, is that it would apply to communities of less than five lots, basically.

7  
8 RALPH WILSON: Yeah, five or fewer lots.

9  
10 Councilmember FLOREEN: So that's unlikely to be a townhouse community per se in  
11 any event.

12  
13 RALPH WILSON: I suppose.

14  
15 Councilmember FLOREEN: Is that the case?

16  
17 RALPH WILSON: I would think so. Yeah.

18  
19 Councilmember FLOREEN: Okay. I wanted to just serve, raise a couple of issues as we  
20 work through this, as one. As the doctrine of unintended consequences. There is also  
21 a provision, somewhere in the zoning ordinance as I recall that provides for exception to  
22 the current height limits, where there is a site plan.

23  
24 RALPH WILSON: In the R60 and R90 zones, the Planning Board, under the zoning  
25 ordinance, has the authority through the site plan review process to allow homes,  
26 residential construction up to 40 feet to the mid-point.

27  
28 Councilmember FLOREEN: And this is not --

29  
30 RALPH WILSON: And three stories.

31  
32 Councilmember FLOREEN: This is not intended to affect that?

33  
34 RALPH WILSON: No. This would not --

35  
36 Councilmember FLOREEN: So, I just wanted to highlight that. It would, though, of  
37 course, affect how one were to calculate that in any event.

38  
39 RALPH WILSON: Yeah. It's a measurement.

40  
41 Councilmember FLOREEN: In any event. Okay. Thanks.

42  
43 Councilmember SILVERMAN: Okay. One down, 12 to go!

44  
45 Councilmember SILVERMAN: Okay. The next issue is measuring a building height from  
46 the average elevation, the finished grade along the front of the building. This is not the



July 12, 2005

1 30 versus 35-foot issue, this is where you're measuring from. This is the methodology  
2 which is used most frequently to measure building height in the County and is the  
3 method used to measure height of homes that are set back from the street more than  
4 35 feet. I don't recall that you, no, you didn't. Okay. That's [overlapping speaker] that's  
5 the majority of the Committee's recommendations.

6  
7 Councilmember PRAISNER: Right. And I didn't take a position on this because, of  
8 course, I thought the conversation within the meeting, which I was missing, would  
9 contribute to where I would wind up. I'm still not sure because of the conversation  
10 seems to suggest from some that this, by doing this one, in essence, it exasperates a  
11 problem in some situations. So, I think we have to have some conversation about this  
12 as well as the next one, which talks about, this appears to be responsive to the terrace  
13 issue, but again, with the two together, I think we need to have some conversation.

14  
15 Councilmember SILVERMAN: If I may, and I want to actually defer to the sponsor of the  
16 Bill. I believe Mr. Denis, you're position is that you're okay with measuring from the  
17 average elevation of the finished grade along the front of the buildings so long as the  
18 absolute building height is dropped from 35 to 30 at the mid point. Is that correct?

19  
20 Councilmember DENIS: That's correct, yeah.

21  
22 Councilmember SILVERMAN: Okay, so, I'm not saying speak now or forever hold your  
23 peace on amendments, but they are linked together. That would be correct. So why  
24 don't we just go into the next issue and then we can ask Susan's comments and then  
25 see what other folks want. The Committee had recommended measuring the building  
26 height to the highest point of the roof surface of a flat roof or the mean height level  
27 between the eaves and ridge of a gable hit. [Inaudible] roof, the Committee would retain  
28 the roof mid point as the upper point for measuring building height and not to the  
29 ridgeline since the mid point has been a practice which is used for the most part in  
30 jurisdictions around the country. The debate that, well, I don't want to say the debate  
31 that we need to have, but the issue, or an issue that's been raised is whether in  
32 combination with where we measure to and where we measure from, do we have the  
33 ability to go from 35 to 30 feet? I think this would be appropriate time to address Mr.  
34 Royalty's concerns about whether we can do what the sponsor of the legislation would  
35 be proposing in an amendment before we get into, we're not going to vote on whether  
36 we agree or disagree with Mr. Royalty's opinion, but let's hear from him, ask whatever  
37 questions people may have, and then move on to what I would gather to be proposed  
38 amendments on this.

39  
40 Council President PEREZ: When you're not tearing down billboards, you're --

41  
42 CLIFF ROYALTY: Well, we're having some success. We've got one down! It's a start!

43  
44 Councilmember ANDREWS: He's a good man to address heights.

45  
46 Council President PEREZ: That's right!



July 12, 2005

1  
2 CLIFF ROYALTY: Well, Is there a question or shall I just--

3  
4 Councilmember SILVERMAN: Your opinion is on Circle 13 and you're basically telling  
5 us, and I want to understand, is you're telling us that you don't think that the scope of  
6 the Public Notice was adequate to address lowering the absolute building height or  
7 eliminating stories. The Committee did not move in the direction of eliminating stories.  
8 But the Committee did, and the Committee didn't on substantive grounds, move from 35  
9 to 30, but you're saying on processed grounds, you don't believe that we can entertain  
10 this. So, give us the 30-second tour and then I guess open it up --

11  
12 Councilmember SILVERMAN: Just comments or questions.

13  
14 Mr. Royalty: Okay, briefly. The post-Public Hearing amendments to any law, to any  
15 zoning text amendment must substantially conform to the Public Notice. And  
16 substantial conform is the legal standard, or one to the legal standards that we're  
17 applying here. There can be no substantial difference according to the courts, and a  
18 law that's passed from that which was advertised. The notice must give citizens who  
19 are likely to be affected reasonable warning that they could be affected by the change in  
20 the law. Now, on its face and based on the information I was given, and, you know, this  
21 is an opinion I turned around in 48 hours, but on its face it would appear to me that the  
22 change in lowering the absolute building height and eliminating stories would be an  
23 expansion of that of which was, that which was publicly noticed and it also would seem  
24 to expand the universe of affected persons potentially, persons who may not have had  
25 sufficient notice to know that they should appear at the original Public Hearing and  
26 comment on the zoning text amendment. It seems to me that changes proposed fall  
27 within that substantiality that the courts have said they cannot fall within. And I was  
28 addressing in my opinion, just to make it clear, the question that was posed was: Could  
29 we lower the absolute building height from 35 to 30 feet and/or eliminate stories as a  
30 measure of building height?

31  
32 Council President PEREZ: What did the notice say? I didn't see it in your memo.

33  
34 Mr. Royalty: It's quoted on the first page, the first paragraph quotes the Public Notice.

35  
36 Council President PEREZ: This was the notice --

37  
38 Mr. Royalty: Yes, I'm quoting it.

39  
40 RALPH WILSON: That's the title of the Bill, as well.

41  
42 Council President PEREZ: Revise the definition of basement, cellar and method for  
43 calculating maximum allowable number of story and building height. What would you  
44 propose, I mean, I guess it, I guess a reasonable person, it strikes me, would look at  
45 this and say this is a Bill about building height.



July 12, 2005

1 Mr. Royalty: Yeah, the method for calculating building height, it intimates to me that first  
2 of all, the stories will be retained and that the question posed to me was, what if we  
3 eliminate stories as a measure of building height? So that's the departure from the  
4 notice. And secondly, changing the method for calculating is not the same as lowering  
5 building height throughout a zone or throughout the County. To me, that's broader.  
6 That's more substantial. That potentially affects more people. It expands the universe  
7 of people who may be affected by the law that's eventually passed. It's not a narrowing  
8 of the zoning text amendment, it appears to me to be an expansion of it.

9  
10 Council President PEREZ: So you're concerned about the method for is unduly narrow.

11  
12 CLIFF ROYALTY: I'm not characterizing it as unduly, I'm just saying that lowering  
13 absolute building height and eliminating stories goes beyond that notice.

14  
15 Council President PEREZ: Okay. So in other words, you need something like lower  
16 building height?

17  
18 CLIFF ROYALTY: That'd be great!

19  
20 [overlapping speakers] value, Mr. Knapp.

21  
22 RALPH WILSON: There was nothing in the amendment itself, either, that dealt with. It  
23 dealt with the definition of how you measure building height and from---

24  
25 Council President PEREZ: Okay. Well, there were a number of lights. Mr. Subin then  
26 Ms. Praisner.

27  
28 Councilmember SUBIN: Thank you. It seems that Mr. Silverman has stated in terms of  
29 looking from the average to the mid point is the issue of method. Plus when you look at  
30 that wording, in terms of the method for calculating building height, it would seem to me  
31 that there's a presumption in there that we're going to be looking at calculating building  
32 height. And that, in and of itself, should send a signal of what is being done. And if  
33 we're going to take such a narrow view then it almost seems we can't amend any Bill  
34 that comes in because the sponsor doesn't know what all the amendments are going to  
35 be when that Bill is introduced. And so, I mean I understand us trying to protect the  
36 process here, but it seems that that is such a narrow way of looking at it, that no  
37 amendment would ever be in order unless the sponsor or the Staff could anticipate  
38 what that was or walk around to every Councilmember and say here's the Bill, how do  
39 you intend to amend this? I mean I do understand what Cliff's saying and I do  
40 understand that he's trying to prevent a lawsuit, if in fact, this passes, but I mean that's  
41 just so narrow, it doesn't seem to me possible to be able to avert a lawsuit on this. If  
42 that in fact is the case. Or any other Bill. Council President PEREZ: Ms. Praisner.

43  
44 Councilmember PRAISNER: Yeah, I'd like to follow up, again, not being a lawyer, but  
45 when I look at a revision to the definition of a basement or a cellar, if you define as  
46 cellar as being no greater than two feet, you have increased the height of the building if



July 12, 2005

1 you have a building taller than, you know, with a cellar that's greater than that because  
2 it's then part of the building. Or if you calculate maximum building height, calculate the  
3 maximum building height differently, the effect of that calculation will be either to  
4 increase or to decrease building height. So, I don't see why building heights itself being  
5 the title, and having this measure of calculation has an end result. You can't calculate  
6 differently without having an impact on height and therefore reduce or increase height  
7 for future buildings. Again, and it may very well be that what you're saying to us is we  
8 have to look more carefully at the language that we use for advertising, but it certainly  
9 seems to me when you advertise a zoning text amendment on building height, just the  
10 title tells you you're going to make some modification, and when then you say it revises  
11 the definition, meaning how you will define these elements and also revise the method  
12 for calculating maximum height, I don't see how you don't have the end result, either an  
13 increase or a decrease and therefore folks are on notice. Maybe we shouldn't have any  
14 language beyond just the title in the future and we should be careful about the title and  
15 maybe there are ways to deal with this, but I guess and again, I'm not a lawyer, would  
16 think that there's a pretty good case to be made for the title of the zoning text  
17 amendment, already suggesting in the word revise, meaning we're going to revise  
18 building height. And just the word "revise" and the term "building height" should put  
19 folks on notice that there's going to be a change.

20

21 RALPH WILSON: You're referring to the title as the first part of the text amendment?

22

23 Councilmember PRAISNER: Right.

24

25 RALPH WILSON: For bulleted items, yeah.

26

27 Councilmember PRAISNER: Right

28

29 RALPH WILSON It says revising the method of calculating.

30

31 Councilmember PRAISNER: Right.

32

33 SPEAKER: So, no matter how you---

34

35 Councilmember PRAISNER: Revise the method, it's going to have a result of a potential  
36 of either being higher or lower.

37

38 RALPH WILSON: But it's always going to be 35 feet, in terms of the measurement  
39 method.

40

41 Councilmember PRAISNER: Well, but I don't, but not necessarily by virtue of what  
42 you've said. You can revise the height by saying it's going to be 20 feet, 10 feet.

43

44 RALPH WILSON: Finished grade to the ridge it would still have to be 35 feet under the  
45 Bill. Councilmember PRAISNER: But that's not, the Bill may say that, but this notice  
46 doesn't say that. If the notice said that we're going to calculate how we determine, how



July 12, 2005

1 we decide what is 35 feet, that might be a notice that says you can't reduce from 35 to  
2 something else, but still might have as an end calculation, the bottom line end result,  
3 that by calculating 35 feet differently, you're lowering the height or raising the height.  
4 That's the quid pro quo of what happens. So, you know, I don't see how you can  
5 untangle them or separate them based on the advertisement that you have.

6  
7 Council President PEREZ: Let me direct a question to Mr. Faden. You've had a chance  
8 to review the County Attorney's, our learned County Attorney's opinion. What are your  
9 thoughts on this?

10  
11 MR. FADEN: A couple of thoughts, Mr. President. First of all, I think the County  
12 Attorney's opinion is quite correct.

13  
14 Council President PEREZ: It's not just regular correct, it's quite correct.

15  
16 MR. FADEN: Exactly.

17  
18 That's a legal term.

19  
20 Exactly. The court's come down very hard on these notice flaws in part because it  
21 enables them to avoid substantive issues and then get the Council action in this kind of  
22 thing. What we do generally, which was not done with this ZTA, and you'll notice if you  
23 look at most of the other Bills in today's packet for either introduction or action, we will  
24 put a generally amend clause on that covers the topic. In this case might have been  
25 building height. That was not done here so that the advertisement, which is based on  
26 the purpose clause, which is the language in the middle of the page, is limited. Very  
27 limited to its specific items and, again, especially with a land use action courts will very  
28 strictly enforce that. A generalyl amended clause would enable you to go beyond the  
29 specific items and cover other issues related to that general topic.

30  
31 Council President PEREZ: So, if I'm hearing you, and I guess I'll use the "you" plural, it  
32 is your legal opinion that if Mr. Denis' proposal were to be voted on today, and assume  
33 for the purpose of this argument that it passed that we would be in a very vulnerable  
34 legal position?

35  
36 MR. FADEN: I think so. But let me emphasize one other point, which is that you're not  
37 precluded from acting on this, all you have to do is hold another hearing.

38  
39 Council President PEREZ: I understand.

40  
41 Okay.

42  
43 I guess, let me turn to Mr. Denis if I could for a moment. Because I'm hearing a certain  
44 level of conviction in the opinion of both Mr. Royalty and Mr. FADEN, and I'm looking at  
45 the Bill which is entitled 03-27, implying that it's been around for a while and so I guess  
46 I'm asking.



July 12, 2005

1  
2 Councilmember DENIS: At least it's 2003 not 1903.

3  
4 Council President PEREZ: I'm asking respectfully what your view might be toward  
5 holding that Public Hearing --

6  
7 Councilmember DENIS: Thank you, Mr. President. First, I'm very gratified by the  
8 comments I've heard from colleagues as to what, if I may interpret, is support for the  
9 concept of what I'm trying to achieve in this Bill and I welcome further comments. I am  
10 concerned about the implication of passing a Bill that might be legally defective,  
11 especially after what I heard Mr. Faden say, our Counsel, that it would be close to a  
12 slam-dunk. Is that what you would characterize it?

13  
14 MR. FADEN: It would have an awfully high burden.

15  
16 Councilmember DENIS: Yeah. But also, I would like to grasp at that life line that you  
17 seemed to throw out at the last participle of your statement and that is, that without  
18 introducing a new Bill, without introducing a new Bill, that it might be possible, if we  
19 would readvertise on this particular Bill, then simply come back in an expeditious  
20 fashion and go back, not to square one, but basically to have an expeditious Public  
21 Hearing and then PHED Committee workshop and then come back to the Council.

22  
23 Councilmember SILVERMAN: I hope not.

24  
25 Councilmember DENIS: Or whatever, then we'll skip that step.

26  
27 In view of the August recess and travel schedules, I don't know how practical it is to do it  
28 before Labor Day, but if that is possible, I would like to know if my interpretation of what  
29 you said is possible and then that would enable us to hold another hearing based upon  
30 a different notice of whatever we're supposed to notice on.

31  
32 MR. FADEN: Mr. Denis, that is exactly what I was saying. You wouldn't be able to do it  
33 before Labor Day in any case because there's essentially a 30-day notice requirement.  
34 But you could readvertise this text amendment more broadly and include on the  
35 amendment like yours in the advertisement, include a generally amend clause and you  
36 would be free to cover any aspect of the building height topic.

37  
38 Councilmember DENIS: Even though I respectfully differ with the opinion, I'm concerned  
39 about having gone this far only to pass something that would be knocked down in the  
40 courts quickly. So, I think that you suggested a way that, I think we could consider this  
41 expeditiously and if the Council agrees to adopt the amendment that I've suggested,  
42 following a different advertisement.

43  
44 Council President PEREZ: And I think what I've heard is that we can have the hearing  
45 and then just come to the full Council for a debate. Because I think this issue has been



July 12, 2005

1 embedded in the Committee and [overlapping speakers] has indicated that he would be  
2 amendable to taking it to the --

3  
4 Councilmember DENIS: That's even more expeditious.

5  
6 Council President PEREZ: So we could bring it back sometime in September.  
7 SPEAKER:

8  
9 Councilmember KNAPP: do we need to make a motion of that effect?

10  
11 Council President PEREZ: I think without objection we can move forward in that way  
12 because I think what I've heard from the County Attorney's and our Council Staff  
13 Attorney --

14  
15 MR. FADEN: You will need to approve a resolution to hold that hearing which Staff can-  
16 -

17  
18 Council President PEREZ: Of course. We can do that. I mean as long as we do that  
19 before the break, we're not going to get to the --

20  
21 MR. FADEN: That's right.

22  
23 RALPH WILSON: Right. Okay.

24  
25 Councilmember SILVERMAN: If I may, I just want to be sure as long as we're covering  
26 all bases there, one of the issues that did not get resolved was issues of grading in new  
27 subdivisions. The Committee was interested in making sure that there was not a  
28 loophole where you could have literally the street and you could have a lot and it could  
29 be subdivided into two lots and somehow, because it's a new subdivision, wouldn't be  
30 covered. That makes no sense. So, I had suggested sort of the five and under theory.  
31 It has been brought to our attention, subsequent to that, that there is an issue with  
32 regard to grading. And I just want to be sure that whatever advertisement goes out will  
33 cover what may be suggested, what are suggested amendments that we've received  
34 information on dealing with the grading issue so that that issue is on the table, as well. I  
35 mean i think that may be a resolvable issue, but I just want to make sure we don't find  
36 ourselves in the same jam with regard to the notice.

37  
38 RALPH WILSON: We might need some clarification on Councilmember Denis' proposal  
39 with respect to the new measurement, who it would apply to. I didn't hear you mention  
40 any subdivision. You said replacement homes, additions --

41  
42 Councilmember DENIS: Right. Well I'm sensitive at this point to even having a second  
43 to the motion. I would not want that to be a defect to the process. SPEAKER: Second.

44  
45 RALPH WILSON: Right. I just wanted to be sure we included that as well.  
46



July 12, 2005

1 Councilmember DENIS: That would not be a defect --  
2  
3 Councilmember SILVERMAN: Wait, I'm sorry. Howie, you don't want it applying to --  
4  
5 Councilmember DENIS: I do want it applied --  
6  
7 Councilmember SILVERMAN: To new subdivisions?  
8  
9 Councilmember DENIS: Yes, yes.  
10  
11 Councilmember SILVERMAN: Right.  
12  
13 Councilmember DENIS: Okay.  
14  
15 Councilmember SILVERMAN: I just want to make sure that the advertisement covers  
16 that but also then would cover what we've been alerted to as an issue of well, fine, if  
17 you're going to apply it to five or whatever, there are grading issues that have to get  
18 addressed at the same time.  
19  
20 RALPH WILSON: But we can ask for testimony on the grading issue.  
21  
22 Councilmember SILVERMAN: As long as the advertisement's broad enough to up to  
23 cover that.  
24  
25 Councilmember DENIS: I just want to make sure that having a second to the motion is  
26 okay. Is that a problem? Because it can be withdrawn. Is that a legal problem?  
27  
28 Councilmember SILVERMAN There's actually --  
29  
30 Councilmember PRAISNER: No?  
31  
32 Councilmember SILVERMAN: I'll defer to the Council President, but I don't think, I  
33 interpreted your comments as being where you wanted to go as opposed to a formal  
34 motion. I think what we're doing here is just deferring action on this ZTA until there's a  
35 Public Hearing. And then when we come back, there will be an opportunity --  
36  
37 Councilmember DENIS: After the magic words are used in the advertisement, then I can  
38 make my comments in the form of a motion.  
39  
40 Councilmember SILVERMAN: Right.  
41  
42 Council President PEREZ: Okay. Mr. Andrews?  
43  
44 Councilmember ANDREWS: I think Mr. Royalty said he wanted reference to stories, as  
45 well.  
46



July 12, 2005

1 CLIFF ROYALTY: Well, I don't know where we're going with stories right now --

2

3 Councilmember ANDREWS: I don't either.

4

5 [overlapping speakers]If you're doing that --

6

7 Councilmember SILVERMAN: As far as where the Committee wanted to go, the  
8 Committee wanted to get rid of stories, is what the Committee wanted to do. Is what  
9 we, so, we want to at least have that discussion, but we were of the belief that we were  
10 precluded from doing that, clearly. I mean that that was out of the box. But this creates  
11 an extraordinary amount of continuing confusion about --

12

13 Councilmember ANDREWS: Let me be clear. I'm not advocating that we get rid of the  
14 stories, but I think we should advertise it if it's a possibility.

15

16 CLIFF ROYALTY: I agree.

17

18 Council President PEREZ: Okay. Ms. Floreen.

19

20 Councilmember FLOREEN: I'm glad we're going to do that, particularly given what we're  
21 dealing with in Clarksburg. But I wanted to say, if we're going to have a Public Hearing,  
22 I would like an answer to my question that I keep asking which--

23

24 Councilmember SILVERMAN: The height of your house?

25

26 Councilmember FLOREEN: I've got my house measured. That's something! But I  
27 wanted, in line with the question of unintended consequences. I wanted to get a sense  
28 if we could from DPS or from someone, as to how many existing homes are at the limit,  
29 at 30, it's a different number than at 35. You did not have that information available for  
30 us in Committee --

31

32 RALPH WILSON: We have it, if you want to look at it now, Susan hand-delivered it.

33

34 Councilmember FLOREEN: But if you can make that part of the public record then so  
35 we can keep it --

36

37 Are we just going to delay this whole thing at this point?

38

39 Councilmember SILVERMAN: We are going to delay it -- I believe that's exactly what  
40 we're doing.

41

42 Councilmember FLOREEN: We don't need to take it up right now.

43

44 Councilmember SILVERMAN: But I'd like to see the paper. I think we'd all like to see  
45 the paper.

46



July 12, 2005

1 Councilmember FLOREEN: I wanted to understand this because I'm aware, anecdotally  
2 of a number of existing homes in existing neighborhoods. I look out the window and I  
3 wonder, of course, this is the City of Rockville, what its rules are. I don't know what its  
4 rules on height are. But I just want to make sure that whatever we proceed to  
5 appropriately protects and reflects the current communities and many of these are not  
6 new homes, they're older homes, 40, 50, 100-year old homes that need to be worked  
7 into the equation. Thank you.

8  
9 Susan SCALA-DEMBY: The figures came from new construction. So that could be that  
10 in most cases it was a demolition and a new house built. And you can see that the  
11 majority are between 30 and 32 feet. But if you look at the difference between less than  
12 30 feet, 105 permits over the course of three years, and more than 30 feet, 450 permits,  
13 you see the difference.

14  
15 Councilmember DENIS: Mr. President I think a correct characterization of what the  
16 Council is doing is to defer action. I think delay has a different connotation to it.

17  
18 Councilmember FLOREEN: Defer, fine. No question.

19  
20 Councilmember DENIS: Because of technical reasons that have been explained and I  
21 think the views of Councilmembers, as expressed, and others that have been  
22 expressed in different forums, I think, I find very encouraging.

23  
24 Councilmember FLOREEN: Do you have any more historic numbers than the recent?

25  
26 SUSAN SCALA-DEMBY: I could go back to 2000.

27  
28 Councilmember FLOREEN: That's as far as you can go back? If you could do that,  
29 thank you.

30  
31 Council President PEREZ: Okay. There are still three lights on. Are both of you -- Mr.  
32 Leventhal.

33  
34 Councilmember LEVENTHAL: Well, I think a critical piece that's addressed on Page 4 of  
35 the memo has to do with what is the effective date of Mr. Denis' proposal because  
36 people's plans are going to be based this. And I appreciate Mr. Denis clarifying how this  
37 would apply to existing housing or to building permits that have already been approved  
38 as of "x" date, but what "x" is really a very important point, especially since the industry  
39 will take some guidance from this and there's a possibility of a, you know, rush to DPS  
40 between now and whenever. So, I guess I'd like to ask the County Attorney's advice as,  
41 we don't know what the Council's going to do, but obviously Mr. Denis says he's  
42 optimistic. And so if there's an optimism that action will be taken, but we don't want to  
43 act without having heard from the public, what should we do with respect to an effective  
44 date knowing that, neither do we want to foster a rush to build really, really big houses  
45 in the closing moments here, if in fact, it may not be possible to do that. So, what's your  
46 advice on that? Let me ask you to answer this question: Would we be violating a



July 12, 2005

1 Public Notice requirement if the proposal that we are now renoting has an effective  
2 date of July 12th?

3  
4 CLIFF ROYALTY: I don't see how you could do that. You're trying to do it retroactively  
5 after, I don't see how it could apply retroactively unless you provided for that in the law,  
6 and then that would be not applying until you actually passed the law. Maybe I'm  
7 missing your question, I think you're looking for retroactive effect is what it appears to  
8 me.

9  
10 Councilmember LEVENTHAL: No, you're not missing it. When I worked on Capitol Hill,  
11 there would be these tax bills and there would be loopholes that would be closed by the  
12 tax writing committees and what would happen is is that there would be, in the industry,  
13 there would a rush to take advantage of the loophole, based on what the effective date  
14 was. And so what would frequently occur is you have this debate over whether the  
15 effective date was the date of Senate Finance Committee action, House Ways and  
16 Means Committee action, full House action, full Senate action and those things were  
17 always hotly debated with respect to these tax provisions. Now you've got a situation  
18 where the possibility exists that certain very, very large homes are eligible today that  
19 may not be eligible after the Council acts. And so the effective date becomes very  
20 important and the next few months become a critical time for industry. And the question  
21 is, what should the effective date be in compliance with our Public Notice requirements?  
22

23 Councilmember SUBIN: And George, you're talking about making the existing homes  
24 non-conforming uses and that's very problematic.

25  
26 RALPH WILSON: It's more of a grandfathering issue, really. You have to decide--  
27

28 Councilmember SUBIN: Well, you'd have to grandfather, but you could put in a date  
29 now and say, you know, for six months from now, so that there is warning this would be  
30 effective as of a certain date, but it's, that's really looking at it prospectively, not  
31 retroactively. I know you're trying to do the, I hate to say it after my earlier comments,  
32 the floodgates, I mean we're trying to think what happened on this because they'd have,  
33 you know, the market would have to be there to just put them all up. I think it could be a  
34 problem. But this is a case where I don't, you're probably creating more a problem by  
35 doing it than what you're trying to avoid.

36  
37 Council President PEREZ: Ms. Praisner?

38  
39 Councilmember PRAISNER: Well, explain to me why we can't make an effective date  
40 other than the 90 days after the zoning text amendment or the legislation --  
41

42 SPEAKER: You can.  
43

44 Councilmember PRAISNER: You can? Also, explain to me how we could have  
45 imposed a moratorium on the siting of towers while we worked through telecom towers,  
46 and have that moratorium in place while we work through issues?



July 12, 2005

1  
2 CLIFF ROYALTY: I wasn't aware of a moratorium on towers.  
3  
4 Councilmember PRAISNER: We did it!  
5  
6 CLIFF ROYALTY: Okay. Well, I don't remember that. I don't remember reviewing it.  
7  
8 Councilmember PRAISNER: Six-month moratorium on towers while we work through  
9 the telecom law.  
10  
11 CLIFF ROYALTY: But you passed a law that did that.  
12  
13 Councilmember PRAISNER: No, we passed a resolution putting a moratorium in place,  
14 while we, I believe it was a resolution. I'd have to go back and look, but I believe it was  
15 a resolution putting a moratorium in place for six months while we revised the  
16 legislation.  
17  
18 CLIFF ROYALTY: Okay. But that was done by some legal means and what you've done  
19 here today is defer, not passed anything --  
20  
21 Councilmember PRAISNER: No, I understand that.  
22  
23 CLIFF ROYALTY: That would create a moratorium, that's the difference.  
24  
25 Councilmember PRAISNER: I very much understand that. My point is that I'm trying to  
26 probe the ability of the Council to make some notice other than an effective date of  
27 legislation, which is our traditional effective date, for something that has been around  
28 since '03. So, yes, we can argue that the specific issue language legally is in question  
29 as to what the Council may do, but the broad topic has been in front of folks for some  
30 time. And there is an issue of filing for a building permit and then going through  
31 construction and so and grandfathering existing homes, which I think folks certainly  
32 appear not to be trying to take the buildings that exist now and ungrant, and make them  
33 non-conforming. There are two different issues.  
34  
35 Councilmember LEVENTHAL: Absolutely. And Mr. Denis spelled out that any existing  
36 building would not be covered. Any building permit application that has already been  
37 filed and has been through the process would not be covered, all of that would be in  
38 place.  
39  
40 RALPH WILSON: So, you can grandfather permit as well as existing homes. Any  
41 building from that file before a certain date can or cannot be grandfathered.  
42  
43 Councilmember LEVENTHAL: But Mr. Denis has laid out that he wants those to be  
44 grandfathered.  
45  
46 RALPH WILSON: Yeah, I understand he did but we're just talking about the issue.



July 12, 2005

1  
2 Councilmember PRAISNER: Well, but the question is prospective for beyond today.  
3 And the point I raised in Committee is, if we still continue to raise an issue, how many  
4 more additional applications for folks who may not even be, who may only be in the  
5 design and concept stage, who now will rush to get a permit in order to follow the  
6 standards that exist now. It's not the person who has the contract or who's, you know,  
7 ordered the supplies and is finishing the paperwork. It's the person who is conceptually  
8 looking at something who, between now and September, can have a lot of activity.  
9 That's my only concern.  
10  
11 SUSAN SCALA-DEMBY: If I may, there's an additional concern on our part of what do  
12 we tell people who ask, bring us a predesign or have some questions about what they're  
13 needing to submit and what the regulations are.  
14  
15 Councilmember SILVERMAN: What are you doing now, Susan?  
16  
17 SUSAN SCALA-DEMBY: What are we doing now? We're telling them what's in the  
18 code now.  
19  
20 Councilmember SILVERMAN: Right. And so you're approving building permits, right  
21 now, based on the code.  
22  
23 SUSAN SCALA-DEMBY: Right. But the way I read this and I don't know that it will stay  
24 this way, but we're talking about any residential building constructed under a building  
25 permit issued after the ZTA effective date, let's just say it was today. We've now told  
26 people who don't have a building permit issued, who are just in the design stage, what  
27 the requirements are and the requirements are changing and we have to go back. And  
28 they've now been in a design stage, they've spent money for an architect or whatever,  
29 so now that's an issue -- [overlapping speakers]  
30  
31 Councilmember PRAISNER: You can tell them what's on the table.  
32  
33 Councilmember FLOREEN: Well .And they'll be aware that there are some changes  
34 likely to occur, one way or the other. And they better pay attention.  
35  
36 Council President PEREZ: I anticipate that we will be back on this issue in September.  
37 So, I think you can give them that notice and you can inform them that if I understand  
38 the law as it currently reads, and we could amend it, as it relates to this Bill, it would  
39 take effect 20 days after the passage of a zoning text amendment. That's the  
40 presumption. Obviously there are, you can override that in a particular circumstance  
41 but you can at least tell them that's the presumption that exists in current law. Mr.  
42 Faden, you were going to mention something and then I was hoping we could wrap up.  
43  
44 MR. FADEN: Just briefly, Mr. President. We think you have a wide range of options  
45 regarding the effective date and I think you should advertise broadly. We would say the



July 12, 2005

1 options extend at least to freezing building permits for this kind of building as of today.  
2 You may not want to do it, but I think that's an option before you.

3  
4 Council President PEREZ: Well, again, an option. I don't take a position. I actually  
5 wouldn't advocate that, but I think if you're talking about making sure the entire range of  
6 options is out there, We should not come back with another legal opinion from Cliff  
7 Royalty saying we didn't do it broadly enough. So, Mr. Knapp had his light on the  
8 longest. Then I'm going to turn to Mr. Silverman to hopefully wrap up.

9  
10 Councilmember KNAPP: On an unrelated topic, Susan, thank you for this building  
11 permits by height. I was wondering if you could also show us how it correlates to the  
12 stories?

13  
14 Councilmember Leventhal: And maybe the zone.

15  
16 Councilmember SILVERMAN: That was the other thing.

17  
18 SUSAN SCALA-DEMBY: These are all for R60s and R90 zones.

19  
20 Councilmember KNAPP: All R60 R90, but just as to what story correlates to, that would  
21 be helpful.

22  
23 SUSAN SCALA-DEMBY: Sure.

24  
25 Council President PEREZ: A loaded question.

26  
27 A question that's very complex.

28  
29 Mr. Silverman? Okay. So, oh, Mr. Denis.

30  
31 Councilmember DENIS: I wanted to thank you, Mr. President and my colleagues on the  
32 Council for giving so much quality time and attention to this, and Ralph Wilson, our  
33 legislative analyst, thank you for your continuing work, and Susan Scala-Demby, thank  
34 you for your work and working with me in if my office trying to resolve this.

35  
36 Council President PEREZ: Ms. Praisner?

37  
38 Councilmember PRAISNER: I just had one question. When will this be advertised?  
39 What's the date of the advertisement?

40  
41 RALPH WILSON: I would anticipate putting a resolution setting a Public Hearing on  
42 what we've been talking about for September and the advertisement would go, would  
43 have to be 30 days before the hearing.

44  
45 Councilmember PRAISNER: No, I want the advertisement out now. Well, before the 30  
46 days.



July 12, 2005

1  
2 Council President PEREZ: We need to introduce something next week.  
3  
4 RALPH WILSON: Yeah.  
5  
6 Let's -- could we say the last day of the session? 25th? I mean we have a, the next  
7 session --  
8  
9 Councilmember FLOREEN: Ralph, the challenge is everyone's on vacation so we need  
10 to get it out earlier so that specific groups --  
11  
12 Council President PEREZ: Let's try to get it out as soon as possible.  
13  
14 Councilmember DENIS: It's just a resolution --  
15  
16 It's a window of opportunity there.  
17  
18 Councilmember PRAISNER: We're not allowed to advertise earlier than 45 days before  
19 the hearing?  
20  
21 RALPH WILSON: Right. No less than 30, no more than 45.  
22  
23 Council President PEREZ: Okay.  
24  
25 RALPH WILSON: So, it has to fit that window.  
26  
27 Councilmember PRAISNER Well that's what I was trying to get at.  
28  
29 Council President PEREZ: What we'll do is we'll reconvene at 1:45. And I think we are  
30 done with this issue until September. So we will simply have this afternoon's Public  
31 Hearing. We have half a dozen speakers and then we'll go from there.  
32  
33 Is Agenda Number 9 our next Item? Okay. There's a Public Hearing on Bill 18-05,  
34 Offensive Public Places which would prohibit urination and defecation in certain places  
35 does that in generally amend the law, relating to offenses in public places. A Public  
36 Safety Committee work session is tentatively set for July 25th at 9:00 a.m. Persons  
37 wishing to submit additional testimony or information for the Council's consideration  
38 should do so by July 18th. And before beginning your presentation, please state your  
39 name clearly for the record. We have five witnesses, Natalie Cantor, hello, Natalie.  
40 Gail Dryer, with the State's Attorney's Office. T.K. Welp, Mid-County Citizen's Advisory  
41 Board. Philipo Alejo. Oh, there you are. Good to see you again. Wheaton Urban  
42 District Advisory Committee and Lieutenant Willie Parker Lone with the Police  
43 Department and we will begin with the Mayor of Wheaton.  
44  
45 Thank you and good afternoon. MS. CANTOR: I'm Natalie Cantor, testifying on behalf  
46 of County Executive, Doug Duncan, in favor of the passage of the Bill 18-05, Offenses



July 12, 2005

1 in Public Places. The problem behaviors that this Bill addresses exists in most urban  
2 areas everywhere. They are not particular to Wheaton. While Wheaton residents and  
3 business people have, for many years, discussed the after-effects of such behavior, our  
4 recent public safety audit, which you all have read, crystallized the need for a legislative  
5 remedy. For over 10 months, the members of the task force heard frustrations of both  
6 sworn and civilian personnel involved in Wheaton's public safety efforts. Participants  
7 realized that there was a gap in our code resulting in an officer's inability to cite  
8 someone caught in the act of public urination or defecation except under certain  
9 conditions. At the same time, people heard about the high costs associated with  
10 cleanup. We learned that some of the after-effects were almost impossible to eradicate.  
11 Joe Calloway, our Operations Manager in the Wheaton Urban District, informed me that  
12 it costs the Urban District \$89 for each incident, essentially the time utilized in pressure  
13 washing. We deal with approximately 40 occurrences per year in which our Clean and  
14 Safe Team members actually see someone in the act. So, you can imagine how many  
15 more are not seen. The task force finished its work with a prioritized list of  
16 recommendations in four areas, for the County Executive. In the category of  
17 prevention, a law banning public urination was ranked number one. You have  
18 appropriated millions of dollars to date for Wheaton's redevelopment. We're on our way  
19 to success. Passage of this Bill will help us to be the clean and safe downtown that we  
20 want to be. It will do the same for all of our urban and urbanizing areas. Thank you.

21  
22 Council President PEREZ: Thank you. Good afternoon, Ms. Dryer.

23  
24 MS. DRIVER: Good afternoon. Just for the record, my last name is Driver.

25  
26 Council President PEREZ: Wow! Sorry about that.

27  
28 MS. DRIVER: When I was before the Council back in June, you asked me some  
29 specific questions so I came today to address those questions. I believe they're also  
30 included in the packet that you have in front of you. One of the questions was: Does  
31 the Bill apply to minors? As the Bill is currently written it would apply to everyone.  
32 Under courts and judicial proceedings, though, Section 3-8a-05d, there's a presumption  
33 of incapacity for any minor under the age of 7. Therefore, as the hypothetical was  
34 presented, a 3-year-old would not be charged or cited in this. Now in Baltimore City,  
35 they do address this problem specifically by inserting language that specifically  
36 addresses minors. I've included a copy of each jurisdiction's Bill with the packets that I  
37 believe you have. So, if you refer to section 5-507 you would see that. And that --

38  
39 Councilmember LEVENTHAL: What page that's on? The cite from Baltimore City?

40 SPEAKER: [inaudible ]

41  
42 MS. DRIVER: Now, why can't Police charge indecent exposure or disorderly conduct?  
43 Indecent exposure was a common law offense that was initially codified back in 1967  
44 under Article 27, or 27 Section 122, as a disturbance of the peace. In 1977, the  
45 legislature amended that specifically outlining indecent exposure. Indecent exposure is  
46 not defined in the statutes, but it is found in the common law. So you look to common



July 12, 2005

1 law, and it refers to lewd or indecent behavior in a public place. Public urination does  
2 not rise to that. It's not necessarily lewd or indecent and also, you would need to have  
3 the activity being done for the purpose of arousing or gratifying some sexual need, and  
4 that's not what public urination is. So therefore, the indecent exposure statutes as they  
5 are written would not apply to this particular, they're not useful for Police to use.  
6 Disorderly conduct, now, this is willful or disorderly manner that a person would be  
7 acting in. Normally that's disturbing the peace. We're generally speaking about some  
8 loud behavior, something that would disturb the peace. There have been some cases  
9 that have referred to obscene behavior as disturbing the peace, but again, that's  
10 obscene behavior. You have to go back and look at the definition that the courts have  
11 provided us and once again you go back to the erratic behavior. And that is not what  
12 public urination is. So therefore, the public urination, or citing someone for public  
13 urination using these two statutes is just not the appropriate manner. The other  
14 question that was asked: Would offenders be issued civil citations or charged with a  
15 misdemeanor? And that, Class A violations in the Montgomery County code can be  
16 charged either as a civil violation or a criminal violation or a civil violation. So, therefore,  
17 it would depend on the discretion of the officer. Is a stay-away order needed? That  
18 was another question that you posed to me. And again, that's something that would be  
19 dependent upon you, the Council, in setting that forward. And that depends on each  
20 individual situation. You have to look at things individually. There would be some  
21 instances where you'd want someone to stay away if there's someone who's been cited  
22 or warned multiple times, then perhaps the officer would want them to stay away. So,  
23 they might use that. But I think you'd have to look at that on a case-by-case basis. And  
24 I believe your bell rang telling me my three minutes are up. I hope I've addressed the  
25 questions that you had. I think there were a few others, but...

26  
27 Council President PEREZ: We'll see if there are further questions, then, when we, at the  
28 end of the panel. Mr. Welp. Ms. Welp, excuse me.

29  
30 MS. WELP: Good afternoon, my name is Ms. T.K. Welp, I'm a board member of the  
31 Mid-County Citizens Advisory Board. As you probably know, our Board advises its  
32 County Council on developments including legislation for a large part of Montgomery  
33 County. I'm here today to let you know that the Mid-County Citizens Advisory Board  
34 supports this proposed legislation, Chapter 32, Section 17a, prohibiting urination and  
35 defecation in public areas in Montgomery County. But suggests a civil penalty of \$100  
36 to \$250 rather than a Class A misdemeanor for the offense. We would also suggest  
37 adding mitigating factors for individuals who do not have the requisite intent, such as  
38 minors under 7, physically-challenged and persons who suffer from some sort of  
39 incontinence. We don't believe that this legislation is important, we do believe that this  
40 legislation is important to the development and enjoyment of all areas in Montgomery  
41 County. But it could be especially important to the Wheaton area. The Mid-County  
42 Citizens Advisory Board has shown support for the recent development and  
43 revitalization of Wheaton. The changes in Wheaton are evident to board members  
44 every time we have a meeting in downtown Wheaton area, which is at least once a  
45 month. The emergence of Wheaton's downtown is very exciting, making Wheaton a  
46 more attractive spot for residents of the surrounding areas to meet and enjoy the shops,



July 12, 2005

1 restaurants that are available. There are however, some issues that still plague the  
2 Wheaton area, and this is one of them. Strolling the streets is not nearly as enjoyable  
3 when foul odors emanate from doorways and individuals can be seen half-hidden  
4 behind dumpsters or cars relieving themselves in public. It is even worse in the  
5 summer. Residents like me would enjoy simply strolling the streets on nice days and  
6 evenings, browsing the shops and restaurants that line downtown Wheaton and this  
7 issue prevents residents from doing just that. In addition, individuals lurking in dark  
8 areas create the illusion that these areas may be unsafe. Further, this problem carries  
9 certain health concerns that I'm sure you'll hear more about today. The board feels it is  
10 important to Montgomery County, to bring Montgomery County into line with many other  
11 counties around the state and the country. Most people I spoke to could not believe  
12 that public urination and defecation were not already outlawed in the County. The  
13 board recommends that this legislation also be followed up with other measures that  
14 can address this problem. For example, the board is very much in favor of providing  
15 more public restrooms in strategic areas to help alleviate this problem and ensure that  
16 individuals do not have to resort to the use of outdoor public areas. Stand-alone pay-  
17 for-use restrooms are being implemented in cities around the country like Los Angeles  
18 and Pittsburgh, as they are already in Europe. Wheaton and other cities around the  
19 country could implement these types of facilities to help with this problem. Also, this  
20 issue is often associated with alcohol consumption.

21

22 Council President PEREZ: Go ahead and finish the sentence.

23

24 MS. WELP: The board is of the understanding that there are other measures in the  
25 works to address this underlying problem, short of arresting and charging every  
26 individual that may be caught urinating in public. Also to the extent that this issue is  
27 associated with alcohol consumption, the Mid-County Citizens Advisory Board supports  
28 the development of measures to address this problem.

29

30 Council President PEREZ: Thank you, Ms. Welp, we have your written testimony.  
31 Thank you very much. Mr. Leo?

32

33 MR. LEO: Good afternoon. My name is Philipo Leo and I'm the chair of the Wheaton  
34 [inaudible] Advisory Committee. I'm also the owner of [Marciano's] Italian Deli, which  
35 has been in business in Wheaton on Triangle Lane for 50 years. I have come here  
36 today to urge you to pass the Bill 18-05. I cannot describe some of the acts I have  
37 witnessed through the windows of my store in the middle of the day. While worse than  
38 my observing such behavior is when my customers see it. I and my staff have had to  
39 put on gloves from time to time to quickly remove unwanted gifts. I'm very proud to be  
40 part of the positive changes that have come to Wheaton in the last four years. The  
41 outside of my store has new awning and paint. Thanks for your funding over the  
42 Wheaton [inaudible] program. Please continue your support for all our downtowns by  
43 passing this Bill. Thank you.

44

45 Councilmember LEVENTHAL: Thank you, Mr. Leo.

46



July 12, 2005

1 I don't see any lights. I have really more of a comment than a question, although if the  
2 State's Attorney's Office wants to comment, I'd appreciate it. Oh, I'm sorry, you were not  
3 listed on the witness list. Please introduce yourself.

4  
5 Lieutenant WILLIE PARKER LONE: Hi, Lieutenant Willie Parker Lone. The  
6 Montgomery County Department of Police is committed to providing the highest quality  
7 of police services to the citizens, workers and visitors of Montgomery County. With the  
8 Council's support, the 4th District is once again able to provide the Wheaton central  
9 business district with a dedicated police presence. This year we will have four bike  
10 certified police officers assigned to the CBD with an additional three officers, one being  
11 a Sergeant on board next fiscal year. It will be a shame to place these officers in an  
12 area where they want to make a difference and not provide them the necessary tools  
13 needed to make that difference. A serious quality of life problem has been identified  
14 and this urination and defecation law clearly targets that problem. In the past, police  
15 officers have made arrests for the acts charging the violators with indecent exposure or  
16 disorderly conduct. We have learned that the statutes don't apply to public urination  
17 and defecation. I have talked to several police supervisors about this new law and they  
18 are excited to finally be able to effectively enforce the County's urination problem.  
19 Sergeant Massen who's shift polices Wheaton CBD agrees that there is a problem and  
20 sees it often. Rob Moss of the Gang Unit and Corporal Martinez , Wheaton's Hispanic  
21 Liaison Officer said they also have witnessed public urination in downtown Wheaton.  
22 This however, is not just a Wheaton problem. Sergeant Del Bora of Bethesda CBD and  
23 Sergeants Amercania, Dommell and Cobb of Silver Spring said they also encounter  
24 urination and sometimes defecation problems. Sergeant Del Bora stated that  
25 Bethesda's problem has been with the vagrants and bar patrons. He also said public  
26 parking garages and stairwells often smell of urine. Sergeants Amercania and Dommell  
27 stated that the stairwells of the Silver Spring parking garages smell of urine. Sergeant  
28 Cobb stated that there are frequent violators in the Piney Branch Corridor. So, as you  
29 see, we have a problem. Please take a minute and come with me on a journey. You  
30 and your family are celebrating some special event. You decide to visit one of the  
31 County's central business districts. Since the price of gas is so outrageous, you decide  
32 to take the Metro. As you and your family exit the Metro and walk through one of the  
33 passageways, the stench of urine fills your nostrils. As you are walking to your  
34 destination, you see the finest of Montgomery's finest in full police uniform. As you  
35 introduce your family to Corporal Martinez, a man appears and begins to urinate. You  
36 turn to Corporal Martinez in obvious disgust and say, aren't you going to do something?  
37 What response would you and your family's rather hear? Sorry, there's nothing I can  
38 do, his behavior is disgusting but not against the law, or I'm sorry you had to see that  
39 and then watch as the man is arrested or issued a citation. Now, imagine this scenario  
40 being witnessed by first-time visitors to Montgomery County, potential businessmen and  
41 women or a group of children on a field trip. Not a pretty picture, is it? In closing, I feel  
42 that Chapter 32, Section 32- 7a, Urination and Defecation in Public is an important law  
43 to pass as it will finally give police officers a proper authority to cite and/or arrest  
44 violators who urinate and/or defecate in public. Thank you for your consideration.



July 12, 2005

1 Council President PEREZ: Mr. Leventhal. Councilmember LEVENTHAL: I absolutely  
2 agree this is a serious problem. I'm well aware of it. I live in the Piney Branch Corridor  
3 on Piney Branch Road. It's certainly a problem for Wheaton, certainly a problem for  
4 Silver Spring and elsewhere in the County. No question that I support this legislation.  
5 With respect to the issue of minors, Ms. Driver, I think the language from Baltimore City  
6 does not get at what my very small issue is and I hope, Chairman Andrews, that when  
7 the Public Safety Committee takes this up, there is a way to deal with this to address  
8 the very serious potential issue that the Lieutenant deals with, with an adult committing  
9 the offense, you know, in plain sight. But those of us who have small children and go  
10 hiking or are in a park for some period of time, and I don't know if the age of 7 is  
11 necessarily the exact the cut-off, but children are not always able to kind of manage  
12 their schedules and their own timing, and so I think I've said it enough, but I just think  
13 there's a small issue here that I hope the Public Safety Committee will take up, which  
14 the Baltimore City language does not get at. The other question I had is: Is it, following  
15 up on the Lieutenant's comments and then following up on Natalie's testimony about  
16 offenses observed by the Clean and Safe Team, who needs to see this offense taking  
17 place in order for the violator to be booked? Does a police officer need to see it? Does  
18 witness testimony to the police officer suffice? How do we book someone for  
19 committing this offense? How much, you know, how much does the individual need to  
20 be caught in the act and by whom?

21  
22 MS. DRIVER: It's, this is Gail Driver speaking. I'm sorry. If you look at the Bill itself,  
23 under Section B, it says, it's outlined and it says a person must not urinate or defecate  
24 whether or not the act is actually viewed by another person. So I don't think that would  
25 be a problem. It doesn't require a citizen or a police officer to have to see it. Whereas  
26 disorderly conduct, it has to be bothering a citizen and not a police officer. This could  
27 be either one. So it's not going to limit.

28  
29 Councilmember LEVENTHAL: Translate that for me into the real circumstances of the  
30 real world. For example, outside of [Marchan's] Deli now. Okay. So the owner of the  
31 deli has seen the act take place. The person committing the act is gone, what happens  
32 then? There's no police officer -- how do you book the person?

33  
34 MS. DRIVER: Well, if the person is gone, then that's just like some of the other  
35 misdemeanor offenses. If they're gone, there's not much that you can do.

36  
37 Councilmember LEVENTHAL: But what if Mr. Leo sees him again and there's an officer  
38 present and says, I know that guy, he did that last week. How do you actually book  
39 someone for doing this? How would this ordinance --

40  
41 MS. DRIVER: As a misdemeanor, it would have to be performed in the presence of an  
42 officer in order for them to be cited. If it's not performed in their presence, then they  
43 can't be cited.

44  
45 Councilmember LEVENTHAL: So this doesn't actually get at the very disturbing  
46 anecdote that Mr. Leo tells since in the anecdote that he describes, he's the only



July 12, 2005

1 witness, the officer's not there. Too bad, the law's on the books, so what? He can't file  
2 an affidavit or something, stating that he's seen it occur?

3  
4 MS. DRIVER: If he had the person's name, there's always a citizen's -- basically a  
5 citizen complaint that can be filed.

6  
7 Councilmember LEVENTHAL: I know the Council President and I were recently in Long  
8 Branch listening to businesses describe this problem. And the passage of this statute, I  
9 think, would not do much to address the problem because you can't have a police  
10 officer on every block every day.

11  
12 MS. DRIVER: We have citizen complaints all the time, just using trespassing as a for  
13 instance, where a person is trespassing on an individual's property and a police officer  
14 is not there. That's a misdemeanor offense. And they can go before a Commissioner  
15 and file a complaint against that person, which would carry basically the same type of  
16 weight as the police officer actually issuing a citation. Then the person would then be  
17 called to court but it would be a citizen's complaint.

18  
19 Councilmember LEVENTHAL: So, Mr. Leo could file a complaint against a specific  
20 individual that he sees in front of his store.

21  
22 MS. DRIVER: He'd have to know the person's name, he'd have to know who it is, but  
23 yes, he could.

24  
25 Council President PEREZ: Ms. Driver you said something that caught my eye because  
26 I've done a little of this work. And you said it has to be, because it's a misdemeanor it  
27 has to be witnessed by an officer. I've never seen --

28  
29 MS. DRIVER: No, a misdemeanor, an officer can't just charge for a misdemeanor if it's  
30 not in his presence. An officer can't come back a week later and give you a citation for  
31 a misdemeanor.

32  
33 Council President PEREZ: But can't you issue an information? A criminal information,  
34 saying that you have --

35  
36 MS. DRIVER: Not on a misdemeanor. That's a felony offense.

37  
38 Council President PEREZ: See in the District, see, I'm more familiar with the District  
39 than with Maryland. You can charge someone --

40  
41 MS. DRIVER: In the District of Columbia --

42  
43 Council President PEREZ: Under an information for a misdemeanor.

44  
45 You can't charge someone with a misdemeanor?



July 12, 2005

1 MS. DRIVER: No.

2

3 Council President PEREZ: Okay.

4

5 Councilmember LEVENTHAL: Well, we're going to have to, once we enact this, we're  
6 going to have to assist our businesses in some of these commercial areas to  
7 understand the procedures involved in filing a complaint. And, you know, in Mr. Leo's  
8 case, you're here and you've told this story, there are many, many others like you and  
9 I've heard from many, many others who have experienced these kinds of things in front  
10 of their business. You're going to have to, how would you advise a business owner to  
11 get the name of the offending party? It's not an easy thing to do.

12

13 Lieutenant WILLIE PARKER LONE: Well, one thing that I will have my Lincoln Sector  
14 officers do, and that's dealing with the central business district, is just as with trespass,  
15 we have a trespass book and we keep a picture and a file for a year of whoever's has  
16 been trespassing. So, we will have, if we arrest somebody or cite somebody, we will  
17 take a picture and have that information so if somebody calls us, a business owner says  
18 yeah, this guy was urinating in front of my business, we can actually bring a book down  
19 and say, okay, which person is it? So we will have a book at the station that we will be  
20 able to show business owners and say, okay, these are all the people who've done this  
21 before, which one is it that did it that day? So that's, we would then be able to provide  
22 names and information.

23

24 Councilmember LEVENTHAL: That's very helpful. That's a step beyond what Ms.  
25 Driver just said. So, number one, if an officer witnesses the violation occurring, the  
26 officer can book the individual. Number two, a citizen who witnesses the violation can  
27 file a complaint, but that requires that that citizen know the name of the offending party.  
28 Number three, and this is what I was hoping was the case, but this is what I'm trying to  
29 understand, a citizen who witnesses it can provide a general description of the offender,  
30 and frequently in this case it's someone who frequents the intersections that are around  
31 a lot, and the hope is that through good community policing, the officers would be able  
32 to track down the individual from a description.

33

34 Lieutenant WILLIE PARKER LONE: Yes.

35

36 Councilmember LEVENTHAL: And, in fact, you might have a lineup or something, as  
37 with another offense, where Mr. Leo could go and say, yeah, that was guy. Yes?

38

39 Lieutenant WILLIE PARKER LONE: Not a lineup, but a photo array. You'd have a book  
40 of violators.

41

42 Councilmember LEVENTHAL: Okay. Could Mr. Leo, if the officer were around at some  
43 other time, could Mr. Leo say that guy committed this offense two weeks ago?

44

45 Lieutenant WILLIE PARKER LONE: Absolutely.

46



July 12, 2005

1 Councilmember LEVENTHAL: And his testimony potentially, depending on the court  
2 decided, could be enough to bring charges against the individual.

3  
4 Lieutenant WILLIE PARKER LONE: Absolutely.

5  
6 Councilmember LEVENTHAL: Okay. Well, that's helpful. Thank you.

7  
8 Council President PEREZ: Mr. Subin. Do you have a sense of the, let's just take  
9 Wheaton, Natalie. Do you have a sense of the profile of the chronic offender? And in  
10 particular what I'm getting at is, are they homeless?

11  
12 MS. CANTOR: Mr. Perez, my experience is that while we do have some homeless  
13 people, I think probably we have about 6 to 10 homeless people who have made  
14 Wheaton kind of their home. But the vast majority of the people who exhibit these  
15 behaviors are people who are intoxicated and I think that most of the occurrences  
16 happen in the evening and we find the after-effects when the Clean Team comes out  
17 the next morning.

18  
19 Council President PEREZ: The reason I asked the question is I've gotten a couple of e-  
20 mails from residents expressing concern that this amounts to the criminalization of  
21 homelessness and what I'm hearing you say is that it really, the offenders that you have  
22 identified are actually not in that category. For the most part.

23  
24 MS. CANTOR: Correct.

25  
26 And while there may be some issues with homeless people in preparation for the  
27 presentation of this Bill, I have received word from Carolyn Colvin that they will be  
28 redoubling their efforts, assuming passage of the bill, to do outreach with our homeless  
29 So I, though would reiterate that the vast, vast majority of cases that actually I have  
30 witnessed are people who are inebriated.

31  
32 MS. DRIVER: Mr. Perez, I spoke with Brian Donahue today, who is one of the, part of  
33 the management team with Westville Wheaton Shopping Center and asked him over  
34 the past two months, how often he had encountered this problem. And he told me there  
35 had been 20 complaints over the past two months. He said he's seen people in their  
36 food court area, outside their food court, there have been different types of people.  
37 Some have been shoppers there and that mall provides a vast array of facilities for use.  
38 So he said the gamut, it's just a gamut of people from different backgrounds and the  
39 past 20 have not been homeless. None of them have been in the homeless category.

40  
41 Council President PEREZ: Okay. That's helpful.

42  
43 Mr. Andrews?



July 12, 2005

1 Councilmember ANDREWS: Thank you. I just wanted to let you know the Public Safety  
2 Committee is scheduled to take this up on the 25th at 9:00 at the work session. You're  
3 all very welcome to come.

4  
5 Council President PEREZ: Thank you for your time.

6  
7 Agenda Item Number 10, this is a Public Hearing on special appropriation to the '06  
8 operating budget of the community grants non-departmental account to support capital  
9 projects for Red Wiggler Community Farm and Holy Cross Hospital in the amount of  
10 \$650,000. Action is scheduled following the hearing. We have one witness.

11  
12 SPEAKER: I'm here to offer you... [inaudible] [overlapping speakers]

13  
14 Council President PEREZ: Maybe we've solved another problem

15  
16 Okay. Let me see here. So we have the appropriation for Red Wiggler and Holy Cross  
17 and our speaker has spoken.

18  
19 And although --

20  
21 Councilmember PRAISNER: And left his imprint.

22  
23 Council President PEREZ: Well, yes, Ike Leggett comes to mind, but yes.

24  
25 WOODY WOODRUFF: Today we had a wonderful day and I'd just like to, you guys  
26 here so much dry stuff. Really. I'd like to let you know kind of what I saw this morning.  
27 We had a group of some 20 kids out to the farm. They spent half of their day doing a  
28 stream study, our new farm in the park system is right on a small stream and they're  
29 doing tests down there and talking about the Chesapeake Bay and how organic farming  
30 positively affects the Bay. Then they went into the fields and helped the growers with  
31 developmental disabilities to harvest vegetables, which will be delivered to the food  
32 bank right now. So today was the kind of day that I love seeing and I hope you will  
33 enjoy your garlic. The garlic is something that each of our growers participates in. In  
34 the fall, they break open that bulb and they take those cloves and they plant them in the  
35 garden. They mulch it and in the spring they uncover that, these are all tasks that they  
36 each one can do and ultimately care for it, harvest and deliver it to customers like you.  
37 We also save our seed so we don't spend any more money on it. So it is, in a nut shell,  
38 our program. And I thank you for your support and for the work you do for our entire  
39 County and the time you put into it. Thanks. And I advocate for this Bill that you guys  
40 are [inaudible]

41  
42 Council President PEREZ: Mr. Subin. Councilmember SUBIN: Woody, we've got to be  
43 the first legislative body to ever be bought off with garlic.

44  
45 I took three!



July 12, 2005

1 WOODY WOODRUFF: It's fresh so be careful.

2

3 Council President PEREZ: Okay. This is Agenda Item Number 10. Moved and  
4 seconded. All those in favor? Unanimous. Mr. Leventhal had asked to be recorded in  
5 the affirmative on this, as well. He just walked out of the room. And the 11th budget  
6 item is, this is a Public Hearing on supplemental appropriations to the FY '06 capital  
7 budget and amendment to the FY '05-10 capital improvements program of the revenue  
8 authority for the King Street Art Center in the amount of, is it \$30,000 or \$30 million?

9

10 Councilmember SUBIN: \$30 million.

11

12 Council President PEREZ: \$30 million. Okay. There are no witnesses.

13

14 Councilmember SUBIN: Approval.

15

16 Councilmember FLOREEN Second.

17

18 Council President PEREZ: Moved and seconded. All those in favor? Unanimous  
19 among those present and Mr. Leventhal also asked to be recorded in the affirmative on  
20 that. And we are adjourned. 7:30, we have 24 speakers, we are in here, the 7th floor.  
21 There's 24 speakers scheduled to speak tonight.

22

23 It will be held at Mr. Subin's home in Gaithersburg. We will all look at his garden and  
24 he's growing garlic there.

25

26